112 & 209 of 1885

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SUPREME COURT
OF THE
UNITED STATES.

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THE PENNSYLVANIA RAILROAD COMPANY; THE PENNSYLVANIA COMPANY; THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY; THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY; AND THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY, *Appellants*,

vs.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,

No. 112.
October Term Docket.
A. D. 1885.

AND

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, *Appellant*,

vs.

INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY; THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY; THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY; THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; AND THE PENNSYLVANIA COMPANY.

No. 209.
October Term Docket,
A. D. 1885.

BRIEF IN BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,

ON PETITION FOR REHEARING.

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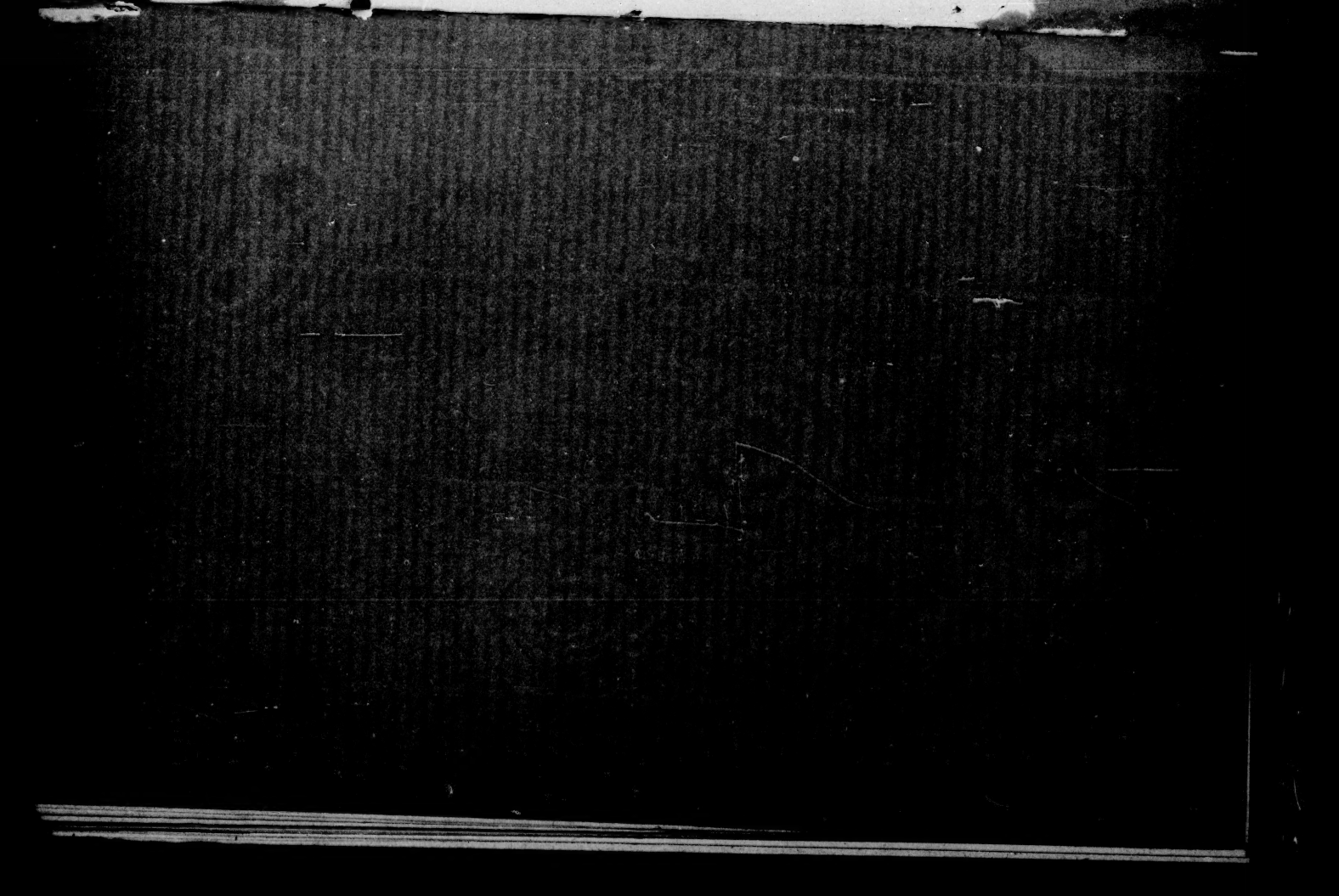

SUPREME COURT
OF THE
UNITED STATES.

THE PENNSYLVANIA RAILROAD COMPANY; THE PENNSYLVANIA COMPANY; THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY; THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY; AND THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY, *Appellants*, *vs.* THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,	No. 112. *October Term Docket. A. D. 1885.*
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BRIEF IN BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,

ON PETITION FOR REHEARING.

In support of the petition for rehearing, filed in the above entitled causes, the following brief is submitted in behalf of the St. Louis, Alton and Terre Haute Railroad Company.

That part of the decision adverse to the St. Louis, Alton and Terre Haute Railroad Company may be stated in three propositions, viz:

1. That the operating contract between the Indianapolis and St. Louis Railroad Company, an Indiana corporation, and the St. Louis, Alton and Terre Haute Railroad Company, an Illinois corporation, termed in the opinion a "lease," is void for want of power in the Indianapolis and St. Louis Railroad Company to make such contract.

2. That the guaranty of the obligations of the lease on the part of the Indianapolis and St. Louis Railroad Company by the guaranteeing companies is void because the contract guaranteed is void, and

3. That this is not a case in which the guaranteeing companies are estopped, by ten years of acquiescence in, and performance of, their guaranty contract, from pleading *ultra vires*, because the guaranteeing companies have received no benefits under the operating contract.

We shall discuss these propositions in the order stated.

I.

Is the operating contract, termed in the opinion a "lease," void for want of power in the Indianapolis and St. Louis Railroad Company to make the same?

The part of the railroad of the St. Louis, Alton and Terre Haute Railroad Company involved in this controversy is one hundred and ninety-three miles in length.

Of this a little over one hundred and eighty-three miles is in the State of Illinois, and a little less than ten miles in the State of Indiana.

It is settled and decided that the St. Louis, Alton and Terre Haute Railroad Company is exclusively an Illinois corporation, owning the few miles of its road within the State of Indiana under license granted by the Legislature of Indiana.

By the Act of the Legislature of Indiana of February, 11, 1851, granting this license to the Illinois corporation, it is provided that "The said corporation shall have all the rights, powers and privileges in taking land and in doing all things necessary to carry on and maintain their railroad perpetually, granted to said corporation by the Legislature of Illinois."

It therefore follows that the entire railroad of the St. Louis, Alton and Terre Haute Railroad Company is owned, governed and controlled under Illinois law.

It is further settled and decided that, for all the purposes of this litigation, the Indianapolis and St. Louis Railroad Company is exclusively an Indiana corporation.

It is conceded by the opinion delivered by Mr. Justice Miller that the St. Louis, Alton and Terre Haute Railroad Company had full power and authority to enter into the operating contract under consideration.

Of course it must also be conceded that, so far as the State of Illinois and its statutes are concerned, the Indianapolis and St. Louis Railroad Company had full power and authority to enter into the operating contract, and to receive and operate that part of the railroad, franchises and property of the St. Louis, Alton and

Terre Haute Railroad Company covered by the operating contract.

It is then the case of a foreign corporation,—the Indianapolis and St. Louis Railroad Company,—contracting, and doing business, in the State of Illinois, under the full, complete and unconditional license and sanction of the laws of Illinois.

It is well settled that a corporation of one State may exercise its faculties in another, so far, and on such terms, and to such extent, as may be permitted by the latter. It may transact business in other States unless prohibited by local laws. It must dwell in the place of its creation, and cannot migrate to another sovereignty, but its residence in one State creates no insuperable objection to its contracting in another State.

Railroad Co. v. *Koontz*, 104 U. S. 12.
Railroad Co. v. *Harris*, 12 Wall. (U. S.) 83.
Bank of Augusta v. *Earle*, 13 Pet. 588.

The only question, then, is, had the Indianapolis and St. Louis Railroad Company,—an Indiana corporation, owning and operating a railroad that, so far as this case is concerned, may be said to extend to the eastern boundary line of Illinois,—power to make this operating contract, and under it transact the business of carrying freight and passengers across the State of Illinois, in connection with its business of carrying freight and passengers over its own line of road as a common carrier?

It is not the case of an Indiana Railroad Company leasing its road and dispossessing itself of its corporate property and franchises, thereby depriving itself of the power to perform its duties to the public, but it is the case of an Indiana Railroad Company holding full pos-

session of all of its own road and franchises, and at the same time making that road more profitable to itself and the public by becoming possessed of additional connecting road and facilities belonging to a corporation of another State by the assent and sanction of that other State.

Just here we wish to press upon the attention of the Court the fact that the Indianapolis and St. Louis Railroad Company has never denied, or even questioned, the validity of the operating contract. On the contrary, in its answer, filed in this cause, it squarely admits the execution of the contract, and admits that it is bound by it. (Record pp. 131-135.)

The Indianapolis and St. Louis Railroad Company has prosecuted no appeal from the decree of the Circuit Court against it in this cause, and is not presenting any question to this Court. If, therefore, the validity of the operating contract is in issue, that issue is presented solely by the guaranteeing companies. The record conclusively establishes the fact that these guaranteeing companies were the promoters of this operating contract; that for the purposes of this operating contract they caused the Indianapolis and St. Louis Railroad Company to be created, and procured the execution of the operating contract by it and by the St. Louis, Alton and Terre Haute Railroad Company; and that, in order to procure the execution of the contract by the parties thereto, these guaranteeing companies executed and delivered to the St. Louis, Alton and Terre Haute Railroad Company the guaranty contract involved in this controversy.

In another connection some light may be thrown upon the sincerity of these guaranteeing companies in

this attack upon the contract they procured to be executed. At present we only wish to fix the fact in mind that the only attack upon the validity of this operating contract is made by the guaranteeing companies that procured its execution.

It should also be remembered that since the adoption of the amended Constitution of Indiana in 1851, all railroad companies or corporations existing under the laws of the State of Indiana are formed and organized under general laws under and in pursuance of the following provision of the Constitution:

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Constitution of Ind. Sec. 13, Art. 11.

Hence the charter powers of Indiana Railroad Companies are not to be measured by any one act or special charter, but are to be found in, and measured by, all the general statutes of the State of Indiana, bearing upon the subject of railroad corporations, and their rights and powers.

We now propose to show beyond any reasonable doubt, that for more than a quarter of a century it has been, and still is, the settled, fixed and well-known policy of the State of Indiana to foster, encourage and promote such connections between the railroads of Indiana and the railroads of adjoining States, as will establish and maintain *continuous lines* of transportation between the great centers of trade and leading markets of the United States.

To accomplish this public policy of the State, the Legislature has, from time to time, as the devolopment of railroad enterprises and railroad commerce seemed to demand or suggest, been liberal in granting full power to railroad companies of Indiana to make any kind of connection, contract or arrangement with railroad companies of adjoining States that are allowed and permissible by the laws of such adjoining States.

No limitation as to the kind or character of contract by which the connection is to be formed, is imposed by Indiana legislation. The only limit seems to be that Indiana railroad corporations may make any kind of a contract for connection with a railroad in an adjoining State that will stand the test of the laws of that State.

Not a line of obstructive legislation, or of legislation in the remotest degree hostile to any kind of a contract by which a continnous through line may be formed by and between railroads of Indiana and railroads of adjoining States, can be found upon the statute books of Indiana, while many statutes can be found either directly granting power to form such connections, by any kind of contract acceptable to the directors of the Indiana corporations, or by clear implication recognizing such power as existing, and legislating in reference to it as an existing power.

Since this decision, if permitted to stand, involves consequences exceedingly serious and disasterous, not only to the St. Louis, Alton and Terre Haute Railroad Company, but also to almost every trunk line of railroad crossing Indiana in any direction, we will, at the risk of

making this brief somewhat lengthy, set forth such laws, and parts of laws, of Indiana as seem to us most clearly to grant authority, either directly or by clear implication, to make just such contracts as the operating contract involved in the case at bar.

The magnitude of the interests involved certainly warrants and demands a full and painstaking investigation.

In 1852 a general act was passed by the Legislature of Indiana, providing for the organization of railroad companies in said State, and prescribing generally the powers of such corporations. By the 37th Section of said act, it was provided that this act might be amended or repealed at the discretion of the Legislature. Broad as that act was, it was very soon found insufficient to meet all questions and cases that might arise with regard to the reorganization of companies, the establishment of railroad connections, the formation of through lines, and other matters necessarily connecting themselves with railroad enterprises and the general railroad system then being rapidly developed. Hence it has happened that numerous acts have since that time been passed, all of which have been treated as amendatory of the original act, and as forming parts of the charters of the railroad companies organized under said original act. We desire to call the particular attention of the Court to several of these statutes.

By the Articles of Incorporation under which the Indianapolis and St. Louis Railroad Company was organized, it was chartered to construct, own and maintain and operate, a line of railroad from Indianapolis to

a point on the western boundary line of Indiana, at or near which the St. Louis, Alton and Terre Haute Railroad crossed said boundary line.

When this operating contract was executed and delivered, the following statutes of Indiana and Illinois were in full force. That they may be more easily compared, we print them side by side.

INDIANA LAW.

"AN ACT to authorize railroad Companies to consolidate their stock with the stock of Railroad Companies in this or in an adjoining State, and to connect their roads with the roads of said companies, and to authorize Railroad Companies to construct their roads on the routes which they may have heretofore surveyed and located, and to use and occupy the same when completed."

(Approved February 23, 1853.)

"Section 1. (Sec. 3971 R. S. Ind. 1881.) *Be it enacted by the General Assembly of the State of Indiana.* That any railroad company heretofore organized, under the general or special laws of this State, shall have the power to intersect, join, and unite their railroad with any other railroad constructed or in progress of construction in this state, or in any adjoining State, at such

ILLINOIS LAW.

"An act to enable railroad companies and plank-road companies to consolidate their stock.

(Approved Febuary 28, 1854.)

"Section 1. Be it enacted by the people of the State of Illinois represented in General Assembly, That all railroad companies and plank-road companies now organized, or hereafter to be organized, which now have or hereafter may have their termini fixed by law, whenever their said road or roads intersect by continuous lines, be, and the same are hereby authorized and empowered to consolidate their property and stock with each other, and to consolidate with companies *out of this State*, whenever their lines connect with the lines of such companies *out of this State*."

"An act to enable railroad companies to enter into oper-

point on the State line, or at any other point, as may be mutually agreed upon by said companies; and such railroad companies are authorized TO MERGE AND CONSOLIDATE THE STOCK OF THE RESPECTIVE COMPANIES, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: *Provided.* Their charters authorize said railroads to go to the State line, or to such point of intersection.

"Sec. 2. (Sec. 3972 R. S. Ind. 1881.) That any railroad company heretofore organized, or which may hereafter be organized under the general or special laws of this state, for the purpose of constructing a railroad from any point within this State to the boundary line thereof, is hereby empowered TO EXTEND SAID RAILROAD into or through any other State or States, under such regulations as may be prescribed by the laws of such State or States, into or through which said road may be so extended, and the rights and privileges of said company over said extension, in the constructive contracts and to borrow money."

(Approved February 12, 1855.)

"Section 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That all railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for *leasing* or running their roads, or any part thereof, and also to contract for and hold in fee-simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act."

The following act was passed in 1869—two years after the execution of the operating contract, but as it should be considered in connection with the act of Indiana, of February 23, 1853, it is set forth here.

"AN ACT in relation to the Indianapolis and St. Louis Railroad Company *and to authorize extension of said Railroad.*

tion and use of said railroad, for the benefit of such company, in controlling and applying the assets of such company, shall be the same as if their railroads had been constructed wholly within this State.

"Sec. 3. (Sec. 3973 R. S. Ind. 1881.) That any railroad company heretofore organized, or which may hereafter be organized under the general or special laws of this State, and which may have constructed, or commenced the construction of their road so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, SHALL HAVE THE POWER TO MAKE SUCH CONTRACTS AND AGREEMENTS WITH ANY SUCH ROAD CONSTRUCTED IN AN ADJOINING STATE, for the transportation of freight and passengers, or FOR THE USE OF ITS SAID ROAD, as TO THE BOARD OF DIRECTORS MAY SEEM PROPER."

"AN ACT to explain an act entitled 'an act authorizing Railroad Companies to consolidate their stock with the stock of railroad companies in this or an adjoining State, and to connect their roads with roads of said companies, and to authorize railroad companies to construct their roads on the

"Section 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that the lease of the St. Louis, Alton and Terre Haute Railroad Company, and the property and road thereof, to the Indianapolis and St. Louis Railroad Company, under which the railroad extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, is now operated, be and stand confirmed according to the terms of said *lease*: Provided, however, that nothing in this act shall be construed to release the said *lessors* from any debt, cause of action or contract now existing against them.

"2. The said *lessees*, their associates, successors and assigns, shall be a railroad corporation in this State, under the said style of "The Indianapolis and St. Louis Railroad Company," and shall possess the same or as large powers as are possessed by said *lessor* corporation and such other powers as are usual to railroad corporations. Said Indianapolis and St. Louis Railroad Company may and are hereby authorized to extend said line of road from any point on the same between the Cities of Pana and Litchfield, on

routes which they may have heretofore surveyed and located and to use and occupy the same when completed,' approved Feb. 23, 1853."

(Approved March 4, 1853.)

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the provisions of the first section of the act above recited were intended to apply to railroads hereafter organized as well as to those heretofore organized and it shall and may be lawful for railroad companies hereafter organized under the laws of this or any adjoining State, as well as those heretofore organized, to consolidate and make their stock joint stock with any other railroad company heretofore or hereafter organized as aforesaid, on the terms and conditions and subject to all the restrictions as stated in said act.

"Sec. 2. Whereas, an emergency exists for the passage of this act, the same shall take effect and be in force from and after its passage."

said road, or from either of said points westward to the Mississippi river opposite Louisiana, or any point below not exceeding fifteen (15) miles, in the State of Missouri, with a branch thereof to the City of Quincy, in the State of Illinois, and the same to connect with the railroad bridge over said river, at said City of Quincy.

"3. This act to take effect and be in force from and after its passage."

(Approved March 10, 1869.)

The *subject* of this Indiana statute of February 23, 1853, is *the connection of Indiana railroads with the railroads of adjoining States*, so as to form continuous lines of transportation. No one can read the statute without so understanding.

The title is broad enough to fully support any provision authorizing a connection between railroads of Indiana and railroads of adjoining States, so as to form continuous lines of traffic and transportation.

The provisions of the act show most clearly the policy of the State of Indiana to be, to encourage and promote such connection, and such construction of railroads, as will result in continuous lines extending into or through adjoining States.

This act, which is still in full force, grants Indiana railroad corporations the right and power to form continuous lines into adjoining States by four different methods, viz:

1. By the first section of this act, an Indiana railroad company may CONSOLIDATE ITS STOCK with the stock of a railroad company of an adjoining State—thus forming one consolidated corporation.

Consolidation would necessarily merge the entire property and road of each consolidating company into the one consolidated company. Therefore connection by consolidation could only take place naturally and properly in cases in which the consolidated company would need the entire property and road of both companies as one continuous line. But often that is not the case. Often one road only wants possession and use of part of another road, in order to complete its continuous line to a desired market. In such case some other method than consolidation must be resorted to, as the company, part only of whose line became part of the continuous line, would still retain, manage and operate

the remaining portion of its road. The case at bar presents a good illustration. The St. Louis, Alton and Terre Haute Railroad Company owns two lines of road, one extending northeast from East St. Louis, Ill., to Terre Haute, Ind., with a short branch to Alton, Ill. The other line of this company extended from East St. Louis, by way of Belleville and DuQuoin, into Southeastern Illinois. The Indianapolis and St. Louis Railroad Company, for the purpose of its continuous line from Indianapolis to St. Louis, only needed and desired that part of the road and property of the St. Louis, Alton and Terre Haute Railroad Company extending from Terre Haute to East St. Louis, with the Alton branch. It had no need of, or use for, the other line of railroad belonging to the St. Louis, Alton and Terre Haute Railroad Company, hence consolidation, which would merge the stock of the entire St. Louis, Alton and Terre Haute Railroad Company with the stock of the Indianapolis and St. Louis Railroad Company, and make a single consolidated company owning and controlling the entire property of both companies, was not what was desired in this case, and would have led to many complications altogether unnecessary.

The Legislature of Indiana saw that just such cases would arise, and hence did not limit the method of connection between railroads of Indiana and railroads of adjoining States to consolidation, but proceeded to define other methods by which connection and continuous lines might be formed. The second section of the act of February 23, 1853, defines another method very clearly, namely:

2. That any railroad company organized "for the purpose of constructing a railroad from any point within this State to the boundary line thereof, is hereby empowered to EXTEND SAID RAILROAD into or through any other State or States *under such regulations as may be prescribed by the laws of such State or States* into or through which said road may be so extended."

This same act of February 23, 1853, furnishes two additional methods.

3. By the third section of the act it is provided that any railroad company "which may have constructed or commenced the construction of their road so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, shall have the power to make such contracts and agreements with any such road constructed in an adjoining State for the transportation of freight and passengers * * * as to the board of directors may seem proper."

Under this power the Indianapolis and St. Louis Railroad Company would undoubtedly have had the right to make a contract with the St. Louis, Alton and Terre Haute Railroad Company, under which the St. Louis, Alton and Terre Haute Railroad Company would have received from the Indianapolis and St. Louis Railroad Company, upon the terms in said contract provided, the freight and passengers of said Indianapolis and St. Louis Railroad Company and transported them from the western terminus of the Indianapolis and St. Louis Railroad to East St. Louis, and by which the Indianapolis and St. Louis Railroad Company would have, upon the terms provided in said contract, received from

the St. Louis, Alton and Terre Haute Railroad Company, its freight and passengers and transported them from the eastern terminus of the St. Louis, Alton and Terre Railroad to Indianapolis. Such a contract we submit is all that could be made out of the provision of the third section above quoted. We further submit that such a contract would fall far short of forming such a connection and continuous line of traffic and transportation as the needs of commerce require, and as is clearly contemplated by this act, and by the acts of Illinois. Under such a contract each company would retain possession of its own line and operate the same with its own rolling stock. Such a contract would not provide for, or cover, the running of *solid trains* over the entire line from Indianapolis to St. Louis. We know of one instance in which such an arrangement was put into operation. It resulted so disasterously and was found hedged about with so many difficulties and delays, that it was very speedily abandoned. But this third section does not end with the power granted in the last above quotation. It goes farther, and provides another separate and distinct method by which connection between railroads of Indiana and railroads of adjoining States may be accomplished so as to form a continuous line of transportation. This fourth method we give in the words of the law itself.

4. That any railroad company "which may have constructed or commenced the construction of their road so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, SHALL HAVE THE POWER TO TO MAKE SUCH CONTRACTS AND AGREE-

MENTS WITH ANY SUCH ROAD CONSTRUCTED IN AN ADJOINING STATE, * * * FOR THE USE OF ITS SAID ROAD, AS TO THE BOARD OF DIRECTORS MAY SEEM PROPER."

We submit that it requires no construction or refining process to get at the meaning of this language. This grant of power is couched in plain and simple words of ordinary meaning. The Legislature of Indiana certainly meant something by them when it enacted them into a statute. The rules of construction require that these words shall have their due and ordinary meaning.

It will be observed that the third section of this act is the one printed in the opinion and commented on by Mr. Justice Miller. Further on we will submit some additional suggestions on this third section. But we desire here to call particular attention to the *second* section of this act, and ask the Court to consider and construe it in connection with the Illinois laws of February 28, 1854, February 12, 1855, and March 10, 1869, printed by its side.

We submit that even if the third section of the act of February 23, 1853, had not been enacted, the second section of that act, taken in connection with the Illinois law of February 12, 1855, gave to the Indianapolis and St. Louis Railroad Company full power and authority to execute this operating contract, and under it take possession of and operate the St. Louis, Alton and Terre Haute Railroad from Terre Haute to East St. Louis *as an extension of its line.*

By this second section the Legislature of Indiana

granted to the Indianapolis and St. Louis Railroad Company power to extend its line of railroad into and across Illinois *in any way that the laws of Illinois would permit.*

It cannot be disputed that under this section the Indianapolis and St. Louis Railroad Company would have had the power to build a new line of road across Illinois if the laws of Illinois would have allowed it to do so, but Illinois had not then, nor has it ever since, given Indiana railroad corporations the right to condemn land and build railroads in Illinois.

It cannot be disputed that under this section the Indianapolis and St. Louis Railroad Company would have had the power to extend its railroad across the State of Illinois, by purchasing outright that part of the St. Louis, Alton and Terre Haute Railroad extending from the western terminus of the Indianapolis and St. Louis Railroad to East St. Louis, if the laws of Illinois would have permitted such purchase, but Illinois has never passed any law authorizing Indiana railroad corporations to purchase the railroad and franchise rights of Illinois railroad companies.

The statutes of Illinois prescribe two methods or "regulations," under which the Indianapolis and St. Louis Railroad Company could extend its line across the State of Illinois to East St. Louis. One was by consolidating with the St. Louis, Alton and Terre Haute Railroad Company. The Illinois law of February 28, 1854, permitted such consolidation, but we have already seen that that was impracticable, because the Indianapolis and St. Louis Railroad Company had no use for a large part of the road of the St. Louis, Alton and Terre Haute

Railroad Company, known as the "Belleville Branch," extending *via* Belleville and DuQuoin out into eastern and southeastern Illinois. The St. Louis, Alton and Terre Haute Railroad Company desired to retain and operate this part of its railroad. Hence extension of its road by the Indianapolis and St. Louis Railroad Company by consolidation with the St. Louis, Alton and Terre Haute Railroad Company was out of the question.

The only other method or regulation by which, under the laws of Illinois, the Indianapolis and St. Louis Railroad Company could extend its railroad into and across Illinois to East St. Louis, was by lease or *operating contract*, under which it could possess and operate that part of the St. Louis, Alton and Terre Haute Railroad extending from its western terminus to East St. Louis.

The law of Illinois of February 12, 1855, permitted such an operating contract or lease to be made by an Illinois railroad corporation. The opinion delivered by Mr. Justice Miller in this case concedes that this Illinois law gave to the St. Louis, Alton and Terre Haute Railroad Company full authority to enter into and execute the operating contract in controversy. We submit that by the second section of the Indiana statute of February 23, 1853, the Indianapolis and St. Louis Railroad Company had full and equal authority to enter into and execute the same operating contract. The conditions and requirements of the laws of both States are fulfilled in this operating contract. The Indiana law said to the Indianapolis and St. Louis Railroad Company "You may extend your railroad into and across

Illinois *under such regulations as may be prescribed by the laws of Illinois.*" The Illinois law said to the Indianapolis and St. Louis Railroad Company "You may extend your railroad into and across the State of Illinois by leasing an Illinois railroad already constructed." Under these two clear and definite grants of power the Indianapolis and St. Louis Railroad Company entered into this operating contract or lease. We submit that the right to make the contract, and the validity of the contract when made, cannot fairly be questioned in the light of a careful examination and comparison of these statutes of the respective States.

That the Illinois Legislature regarded this operating contract or lease as being made, on the part of the Indianapolis and St. Louis Railroad Company, under the authority of this second section of the Indiana statute of February 23, 1853, and that the contract amounted to an extension of the Indianapolis and St. Louis Railroad across the State of Illinois, is clearly manifest by the language used in the title, and in the body of the Illinois law of March 10, 1869, above set forth.

That law seems to have been passed for the express purpose of meeting the very words of the second section of the Indiana law of February 23, 1853, and fully ratifying the contract made by the Indianapolis and St. Louis Railroad Company under the authority of that act. The words of the title of this last named Illinois law—which was passed just as the Indianapolis and St. Louis Railroad was approaching completion, as shown by the record in this cause—are, "An act in

relation to the Indianapolis and St. Louis Railroad Company, *and to authorize extension of said railroad.*" The first section fully ratifies and confirms the lease or operating contract. The second section proceeds to more fully confirm the contract as procuring and amounting to an extension of the Indianapolis and St. Louis Railroad by conferring upon the Indianapolis and St. Louis Railroad Company corporate powers in Illinois in respect to the line of railroad covered by the lease or operating contract.

We are satisfied that this Court would not have rendered the decision as delivered in the opinion of Mr. Justice Miller, if these statutes in full had been before the Court for examination and comparison.

In the spring of 1869 the Indianapolis and St. Louis Railroad Company was approaching completion, having been constructed westward beginning at Indianapolis. As before stated its Articles of Incorporation embraced a line from Indianapolis to a point on the boundary line between the States of Indiana and Illinois at or near which the St. Louis, Alton and Terre Haute Railroad then crossed said boundary line.

The promoters of the Indianapolis and St. Louis Railroad, desiring to save the building of an additional line from Terre Haute, to the State line procured the enactment of the following law by the Indiana Legislature.

"AN ACT to enable railroad companies which have formed articles of association, naming the places from and to which the proposed roads are to be constructed, to perfect their lines by connections, to preserve

their franchises, and to define the extent, character, and privileges of the same.

(Approved May 4, 1869.)

Section 1. (Sec. 3967 R. S. Ind. 1881.) *Be it enacted by the General Assembly of the State of Indiana*, That any railroad company organized and incorporated under the general laws of this State, for the purpose of building a railroad from any point in the State to a point on the State line, shall be authorized to connect with any other railroad already made from such point on the State line, at any convenient point of intersection within this State.

Sec. 2. (Sec. 3968 R. S. Ind. 1881.) Such connection may be made by agreement between the respective companies, under and in accordance with the provisions of, and with all the rights, power and privileges granted by an act entitled 'An act to authorize two or more railroad companies to assume a common name, and to sue and be sued, contract and be contracted with, and prosecute their business under such common name,' approved January 25th, 1853.

Sec. 3. (Sec. 3969 R. S. Ind. 1881.) Any such railroad company so connecting with the road of another company, shall not be required to complete its own road to the State line, so long as it shall continue to be thus associated with the company owning such other road, already built from the State line; but its franchises and powers to build and complete its own road, to the terminal point on the State line, whenever it shall be necessary so to do, shall remain unimpaired: *Provided*, that a consolidation, *either temporary* or permanent,

effected under the first section of this act with any railroad company, whose bridges or any of them, may be jointly used or occupied, or where a right by law exists to use and occupy by any other company, shall not in any manner affect the rights therein vested or secured by any act heretofore passed upon that subject.

Sec. 4. (Sec. 3970 R. S. Ind. 1881.) Any railroad company organized as in the first section of this act mentioned, and completing its connection with its terminal point on the State line by connection with the railroad of another company, as authorized by this act, shall be taken and deemed to be a company owning and constructing a road to the State line, and shall possess all the rights, franchises and privileges, and be subject to all the obligations and duties of a railroad company owning a road to the State line, as prescribed by any general law of this State, not inconsistent with the provisions of this act."

It is a matter of history, well-known in Indiana, that this law was procured by the promoters and builders of the Indianapolis and St. Louis Railroad, and that the law was devised and passed for the especial benefit of the Indianapolis and St. Louis Railroad Company, although under the Constitution of the State, it was necessarily made general in form.

When this law was passed the Indianapolis and St. Louis Railroad Company had possession of the St. Louis, Alton and Terre Haute Railroad, and had been in possession and operation of it under this lease or operating contract for nearly two years. This fact was

well-known to the Legislature of Indiana. It was thoroughly known throughout the State that the Indianapolis and St. Louis Railroad Company was organized, and that its road was being built for the express purpose of holding and operating the St. Louis, Alton and Terre Haute Railroad, in connection with its own road, as a rival line, between Indianapolis and St. Louis, to the Terre Haute and Indianapolis Railroad, and the new line being built across the State of Illinois known as the "Vandalia Line."

The refusal of the Terre Haute and Indianapolis Railroad Company to execute the original operating contract devised and procured by these guaranteeing companies and the Pennsylvania Railroad Company; the withdrawal by the Pennsylvania Railroad Company from the league of eastern railroad companies; and the creation of the Indianapolis and St. Louis Railroad Company as a substitute for the Terre Haute and Indianapolis Railroad Company in the operating contract were all well-known facts. The formation of these two competing lines between Indianapolis and St. Louis where only one line had existed attracted more than usual attention. The Legislature of Indiana perfectly understood the situation when it passed this law.

Would it have passed this law in aid of the Indianapolis and St. Louis Railroad Company if the laws and the policy of Indiana prohibited an Indiana railroad company from executing such a contract as this operating contract, under which the Indianapolis and St. Louis Railroad Company was then operating the St. Louis, Alton and Terre Haute Railroad?

The act of January 25, 1853, mentioned in the second section of the statue last above set forth, reads as follows, viz:

"Section 1. (Sec. 3965 R. S. Ind. 1881). *Be it enacted by the General Assembly of the State of Indiana*, That whenever two or more railroad companies have heretofore become associated or shall hereafter become associated in jointly making or running their roads under any contracts formed or to be formed by such companies, and desire to assume one common name, it shall and may be lawful for such companies by resolution of their respective boards of directors, entered upon their records, to adopt such name as shall be agreed upon."

By this law it will be seen that among other grants of power given by Indiana to its railroad companies, we here have the direct power given to railroad companies to enter into co-partnership and under a firm name transact the business of carrying on railroads. At all events, this law clearly shows the liberality of the Legislature of Indiana in respect to its railroad policy.

In a former brief we contended, and still insist, that the last clause of the third section of the act of February 23, 1853, contains a grant of power amply sufficient to authorize the Indianapolis and St. Louis Railroad Company to enter into this operating contract.

After quoting this third section, the opinion delivered by Mr. Justice Miller proceeds as follows:

"We cannot see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another,

on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk."

We confess that we were not a little surprised on reading this announcement. It seems to us that it is utterly impossible to read the section without seeing that it provides for two separate and distinct kinds of contracts, or rather, that it provides for the making of contracts upon two separate and distinct subjects. We can best illustrate by dividing the section into its two distinct grants.

"Sec. 3. Any railroad Company heretofore organized or which may hereafter be organized under the general or special laws of this State, and which may have constructed or commenced the construction of its road, so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, shall have the power to make such contracts and agreements with any such road constructed in an adjoining state, for the transportation of freight and passengers * * * as to the board of directors may seem proper."

"Sec. 3. Any railroad Company heretofore organized or which may hereafter be organized under general or special laws of this State, and which may have constructed or commenced the construction of its road, so as to meet and connect with any other railroad in an adjoining state at the boundary line of this State, SHALL HAVE THE POWER TO MAKE SUCH CONTRACTS AND AGREEMENTS WITH ANY SUCH ROAD CONSTRUCTED IN AN ADJOINING STATE, * * * FOR THE USE OF ITS SAID ROAD AS TO THE BOARD OF DIRECTORS MAY SEEM PROPER."

Do these two sections as above printed mean the same thing? Manifestly they do not. By the words

"or for the use of its said road," the Legislature evidently intended other and different "contracts and agreements" than mere contracts and agreements "for the transportation of freight and passengers," for it had just given the power to make contracts for the transportation of freight and passengers. The disjunctive "or" is used, clearly showing the intention to make two different grants of power. Yet, under this announcement in the opinion, the two clauses of the section are made to mean one and the same thing, or rather, the last clause is deprived of all force and made to mean nothing, because the first clause granting power to make contracts and agreements "for the transportation of freight and passengers," is certainly broad enough to fully cover contracts "which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk."

The hauling by the St. Louis, Alton and Terre Haute Railroad Company with its engines over its track, in connection with its own trains, of all loaded freight and passenger cars delivered to it by the Indianapolis and St. Louis Railroad Company at the western terminus of the Indianapolis and St. Louis Railroad would certainly fall directly under the term "transportation of freight and passengers;" in fact, that is just what it would be, and it would not be anything else. It would not be the Indianapolis and St. Louis Railroad Company having *the use of the road* of the St. Louis, Alton and Terre Haute Railroad Company, but would simply be

the St. Louis, Alton and Terre Haute Railroad Company having the use of, and using its own road to transport the freight and passengers delivered to it by the Indianapolis and St. Louis Railroad Company, in connection with its own traffic.

But why should this Court seek to limit and restrict this law to one single kind of contract? No such limitation or restriction can be found in the words of the law. The law says that any railroad corporation of Indiana that has constructed or commenced the construction of its road, so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, "*Shall have the power to make* SUCH CONTRACTS AND AGREEMENTS *with any such road constructed in an adjoining State,* * * * *for the use of its said road*, AS TO THE BOARD OF DIRECTORS MAY SEEM PROPER."

If language means anything, these words mean that the board of directors of the Indiana railroad corporation has the right and power given to it to determine the kind and character of contracts it will make with the railroad corporation of an adjoining State, "for the use of its said road."

Under the words of this statute, and under the clear grant of power given by them, the board of directors of an Indiana Railroad corporation might make a contract for the *partial* use, or for the *joint* use, or for the *exclusive* use of a railroad in an adjoining State. The kind of contract and the extent of use are matters left in the discretion of the board of directors, and its power is

plenary over that subject by the express grant given in the statute.

In the case at bar the contract made was for the exclusive use of part of the railroad of the St. Louis, Alton and Terre Haute Railroad Company. We again insist that a fair construction of this section, applying to it the usual and well settled rules of construction and interpretation of statutes, make it amply sufficient to support this operating contract.

When taken in connection with the second section of the same act, and the three acts of Illinois above quoted, it seems to us impossible for this Court on full consideration to hold that the Indianapolis and St. Louis Railroad Company did not have direct and explicit authority to make this operating contract.

The construction given to this third section of the Indiana Statute of February 23, 1853, in the opinion seems to be based mainly upon the case of *Board of Commissioners of Tippecanoe County* v. *Railroad Company*, 50 Ind., 110. After quoting a sentence from the opinion in that case the opinion in the case at bar proceeds as follows:

"This was said in a case where the whole question turned on the power of one railroad to make, and the other to receive, a lease of the road."

We submit that this is a mistaken statement of the question upon which the decision in that case turned, if the Supreme Court of Indiana understood its own decision. The Supreme Court of Indiana certainly decided the case. In the decision the Court said:

"We do NOT decide that railroad companies cannot become lessors or lessees of other railroad companies, for the purpose of running their lines in conjunction, facilitating commerce, travel and transportation."

If, then, the Supreme Court of Indiana understood its decision, the case did *not* turn "on the power of one railroad company to make, and the other to receive, a lease of the road."

We are confident that a careful examination of the decision will convince this Court that the case in 50 Ind., turned upon two points, viz:

1. That the contract involved in the case was a fraud upon the rights of certain stockholders, and

2. That the contract contravened public policy, because it, in effect, caused the abandonment of the construction of the line of road from Lafayette to Muncie—nearly two-thirds of the original corporate line—and wholly destroyed the Lafayette, Muncie and Bloomington Railroad as a competing line with the Wabash, St. Louis and Pacific Railway, the lessee party in said contract.

The Board of Commissioners of Tippecanoe County, being a large stockholder in the Lafayette, Muncie and Bloomington Railroad Company, brought this suit directly against the company and its claimed lessee, the Wabash, St. Louis and Pacific Railway Company, to set aside a contract in the nature of a lease, but which was in effect a transfer of the finished portion of the road to the perpetual control of the lessee company, virtually abandoning the unfinished portion of the line.

The Lafayette, Muncie and Bloomington Railroad was in process of construction and its road had been completed from the Illinois State line to the city of Lafayette, about one-third of the distance of the corporate line of the company, but no part of it had been in operation and it was entirely without rolling stock or other equipment, except such as was used in connection with its construction. The Lafayette, Muncie and Bloomington Railroad Company, having passed under other control, after this contract had been entered into, united with the stockholders in an attack upon the contract, and filed a cross-bill setting up substantially the same facts as those relied on by the Board of Commissioners. It was charged in the bill of the Board of Commissioners that this contract had been fraudulently entered into by the directors and officers of the company controlling it at the date of the contract, and that it was *ultra vires* and void.

This contract, thus tainted with the charge of fraud, was so drawn that the Supreme Court seem to have been unable to characterize it either as a lease or a sale, but its effects are clearly stated by the Supreme Court of Indiana in its opinion. It cut the Lafayette, Muncie and Bloomington Railroad at Lafayette, and attached its Western Division to the Toledo, Wabash and Western Railway, forming a continuous line of road from Bloomington, Illinois, to Toledo, Ohio, instead of a continuous line from Bloomington, Illinois, to Muncie, Indiana, as contemplated by the original organization. It left the Eastern Division of the Lafayette, Muncie and Bloomington Road merely a local road between Lafayette and Muncie, without a western connection and

wholly destroyed as a competing line with the Toledo, Wabash and Western Railway. The aid obtained by taxation, and the stock subscribed along the line between Lafayette and Muncie, were perverted from their original purpose—the building of a line that would compete with the Toledo, Wabash and Western Railway—and subordinated wholly to the interests of the Western Division, and to the interests of a portion of the stockholders particularly interested in the Western Division. It contravened public policy, because instead of facilitating commerce, travel and transportation, it throttled and destroyed two-thirds of the proposed new line, and made the Western Division merely a feeder to, instead of a competitor against, the Toledo, Wabash and Western Railway. The decision of the Court was against the validity of the contract, and was supported by a lengthy opinion in which, as we claim, nothing appears which can be properly construed as establishing a construction of the statute of February 23, 1853, that would impair or render void the contract under consideration in this case. It is true the Supreme Court of Indiana, in the decision, in referring to this act, uses the expressions quoted in the opinion of the Court in this case, among others, that "the title of the act nowhere mentions a lease or a sale," but, as the Constitution of Indiana does not require the title to do more than to properly express the subject of the act, this expression of the Supreme Court of Indiana cannot be held to impair any proper right or authority which the act itself may confer. In commenting upon the last clause of this third section of the act of 1853, it would seem very clear that the learned

Judge who framed that opinion understood it to confer more power than is suggested in the opinion of the Court in this case; namely, to enter into such agreements for the use of the road of another company in running cars over it to their destination without breaking bulk, for it is said by the Supreme Court of Indiana in the decision, "even if this section could be held to authorize the transfer of the use of one road to another, the words cannot fairly mean the transfer of *one division of a road to the injury of another division of the same road*, thus putting the two divisions in direct antagonism, both in their interests and connection."

Having held for the reason stated by the learned Judge who delivered the opinion, that that particular contract was not authorized either by public policy or by the Legislature of the State, the opinion proceeds to state:

"We do not decide that railroad companies cannot become lessors or lessees of other railroad companies, or make other contracts with other railroad companies, for the purpose of running their lines in conjunction, facilitating commerce, travel, and transportation, or for any legitimate purpose for which railroad companies are organized. There is much in the legislation of the State favoring this view and many decisions of this court sustaining the advancing enterprise of the country, but all such contracts must come within the powers of the corporation, must not exceed the powers of the agency that makes them, must not violate the rights of stockholders or contravene public policy."

In the opinion on petition for rehearing in this same case the Supreme Court of Indiana say:

"The appelles seem to think that we ought to have decided the general question, whether railroad companies can lease their roads under the laws of this State. * * * When such a question is properly raised before us upon a lease made for the legitimate purposes of commerce and travel, and in accordance with the proper use of railroads, it will be our duty to decide whether such a lease is authorized and can be upheld by the laws of this State. It must be remembered that courts can decide nothing but what is fairly within the record in each given case. * * * In the case under consideration, the want of power was pleaded against the corporation to prevent the perpetration of an alleged wrong."

After the use of such language as we have quoted from the original decision, and from the decision upon petition for rehearing, we do not see how it is possible to claim that this case decides against the power of one railroad company to make, and the other to receive, a lease of a road. This language, quoted from the Indiana decision, might well apply to the action of the Indiana companies involved in the contest then before the Court. At the same time this language clearly draws a line between contracts of the kind involved in that controversy and ordinary *bona fide* leases for the purpose of facilitating commerce, travel and transportation. In that case the result of the contract was to defeat the purposes of the organization of the Lafayette, Muncie and Bloomington Railroad Company and subordinate

the interests of that company to the interests of a rival line. The operating contract in the case at bar is for no such purpose, but is for the purpose of extending the line of the Indianapolis and St. Louis Railroad Company through the State of Illinois under authority directly conferred by the State of Illinois to make such extension.

In this connection we desire again to call the attention of the Court to the fact that the laws of Indiana relating to the organization and corporate powers of railroad companies have for their design the developement of the railroad system of Indiana, in connection with the systems of adjoining States, and particularly those of Ohio and Illinois. Such has clearly been the public policy of Indiana for over a quarter of a century. The railroad system of the United States is based upon the legislation of the several States, and as no State possesses any authority in and of itself to authorize the construction of railroads beyond its own limits, in the organization and operation of what are termed "trunk" or "through" lines, it becomes absolutely indispensable to have the concurrence of the State authorities of other States, and nowhere is this more indispensable than in the State of Indiana, extending as it does from the Lakes to the Ohio River. No trunk line extending from the eastern sea-board beyond the western boundary line of the State of Ohio can be a *continuous line* across the State of Indiana without the authority of the State of Indiana. Therefore, not only by its legislation, but by its public policy in co-operating with other States, and by the universally recognized comity between States, Indiana has uniformly extended Legislative facilities,

permitting and encouraging the formation of continuous lines of traffic and transportation. The judicial decisions of Indiana have also in their general scope and bearing strengthened and upheld that policy, so that it may be regarded as the settled public policy of the State to favor the formation of continuous or through lines of transportation. That such is and has been the policy of the State of Indiana is clearly announced in the decision in 50 Ind., above commented on.

After having expressly stated that the Court did not decide that railroad companies cannot become lessors and lessees of other railroads, or make contracts with other railroads for the purpose of forming continuous lines, it states:

"There is much in the Legislation of the State favoring this view, and many decisions of this Court sustaining the advancing enterprise of the country."

Since the decision in 50 Ind., in the case of *Hill* v. *Nisbet*, 100 Ind., 341, our Supreme Court has gone much farther than any implication of the decision in 50 Ind., would suggest in upholding arrangements looking to the formation of continuous lines of transportation. There is nothing in the laws of Indiana that directly authorizes an Indiana railroad corporation to buy stock, or a majority of the stock of another railroad corporation. Any such purchase, standing solitary and alone, could not be upheld as being within the corporate powers of the companies to such contract of purchase and sale. But in the case just cited, such a purchase of the stock of one railroad corporation by another railroad corporation is upheld, because it was

made with the ultimate view of forming a connection between the two lines.

After admitting the rule to be that in general one corporation cannot, without express statutory authority become the owner of any portion of the stock of another corporation, the Supreme Court proceeds to say:

"Whether the purchase of stock in one corporation by another is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish."

"Section 3951, R. S. 1881, authorizes any railroad corporation organized under the provisions of the general railroad law, 'to acquire by purchase *or contract*, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect its line; and if in any case it should appear to be a necessary or reasonable means to that end, no reason is perceived why it might not be accomplished by purchasing the stock, instead of purchasing the corporate property directly. In short, the purchase of stock by one railroad corporation in another will be upheld whenever it is a necessary or reasonable means to the accomplishment of an end proposed, which is within the scope of its statutory powers.

"Keeping in view the averments in the complaint, from which the purpose for which the stock was purchased may be fairly inferred, and considering the broad and comprehensive powers, conferred by the statutes on

railroad corporations, authorizing them to acquire real and personal property, 'necessary to accomplish the object for which the corporation is created,' and to acquire the property of, and consolidate with uncompleted connecting and intersecting lines, and we cannot say that the purchase of the stock was unauthorized. R. S. 1881, sections 3903, 3951.

"The presumption must be indulged that the purchase of the stock of the Cincinnati, etc., Co. by the Local Trade Co., was a necessary or reasonable means to the accomplishment of the object which the corporation had in view, and that that object was within some one of its statutory powers. *Ryan* v. *Leavenworth, etc., R. W. Co.*, 21 Kan. 365, The facts in the case cited were that the Leavenworth, Atchison and Northwestern Railway Company was organized to construct a railroad from Leavenworth to Atchison, and the Missouri River Railroad Company owned a railroad running from Leavenworth to Wyandotte. The company first named purchased from the county and city of Leavenworth $250,000 of the stock of the last named company, with a view of having a continuous line from Atchison to Wyandotte, and the contention was made there, as here, that the purchase of the stock was *ultra vires*. The learned judge, pronouncing the judgment of the court in that case, after referring to the statutes of the State of Kansas, which are similar to ours, said: In view of these powers so conferred by law, the act of purchasing said stock by the Leavenworth, Atchison and Northwestern Railroad Company of the county and city of Leavenworth, was not *ultra vires*. While it is not shown

by the petition that the purchase of this stock was necessary for the purposes of the corporation, in the absence of any statement to the contrary, we are to presume the company was acting within the terms of its authority and power.'

"Church, J., in *City of Bridgeport* v. *Housatonuc R. R. Co.*, 15 Conn. 475, said: 'It has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation. * * * In doing this, they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation.' "

In support of the views thus expressed by the Supreme Court, it cites sections of the statute of the State of Indiana illustrating the general character of the legislation of Indiana with respect to the powers of railroad corporations, and the purposes of that legislation, as favoring railroad extensions and the formation of continuous lines of transportation.

In further support of the proposition that the Indianapolis and St. Louis Railroad Company had full power and authority, by direct legislative grant, to make the lease or operating contract in controversy, we desire to call the attention of the Court to the following law, which was in full force when this contract was made, and still remains in force, viz:

"An Act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations, and to exercise corporate powers, and to define their rights, powers, and privileges; to

enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same. (Approved March 3, 1865.)

"Sec. 7. (Sec. 3951 R. S. Ind. 1881.) Any railroad company incorporated under the provisions of this act, shall have the power and authority *to acquire*, by purchase *or contract*, the road, road-bed, real and personal property, rights and franchises, of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, *or the use and enjoyment thereof, in whole or in part*, AND MAY ALSO PURCHASE OR CONTRACT FOR THE USE AND ENJOYMENT, IN WHOLE OR IN PART, OF ANY RAILROAD OR RAILROADS, LYING WITHIN ADJOINING STATES, etc."

What do these words mean? Can they possibly be construed as meaning anything else than that an Indiana railroad corporation has the power to contract for the use and enjoyment in whole or in part of any railroad in an adjoining State? That is just what the Indianapolis and St. Louis Railroad Company did by the contract in controversy. It contracted for the use and enjoyment of the St. Louis, Alton and Terre Haute Railroad, a railroad of Illinois, organized under and controlled by Illinois law.

If it is contended that this law applies only to railroad corporations organized by purchasers at foreclosure sales of railroads, our answer to such a suggestion would be threefold.

1. It would be absurd to suppose that the Legislature of Indiana intended to confer larger powers and broader grants upon railroad corporations reorganized

upon the foreclosure and sale of pre-existing railroads than were conferred upon the original railroad corporations foreclosed, or than are conferred upon new railroad corporations organized for the construction of new lines of railroad.

To entertain such a supposition would be to assert that the Legislature of Indiana offers a premium to its railroad corporations to become insolvent and go into bankruptcy and liquidation, in order that by reorganization on foreclosure sale they may obtain larger powers and valuable additional grants of corporate authority.

2. Such legislation would be *special* legislation, and legislation in favor of a *particular class* of railroad corporations, to the exclusion of all other railroad corporations, which would be in direct violation of the provisions of the Constitution of Indiana.

3. The Supreme Court of Indiana has already decided in *Hill* v. *Nisbet*, 100 Ind. 350, that this very section is a part of the "General Railroad Law" of Indiana.

We contend that in the statutes already quoted there are three clear grants of power, either of which conferred authority upon the Indianapolis and St. Louis Railroad Company to make the operating contract in controversy, when construed in connection with the statutes of Illinois, namely:

1. The grant of power contained in the second section of the act of February 23, 1853.

2. The grant of power contained in the last clause of the third section of the act of February 23, 1853.

3. The grant of power contained in the seventh section of the act of March 3, 1865.

In 1875 the Legislature of Indiana passed an act providing for the incorporation of companies for the purpose of constructing railway bridges and tracks over rivers and streams forming parts of the boundary of the State. We quote the title and part of the tenth section of this act.

"An Act providing for the incorporation of companies formed for the purpose of constructing bridges for railway or common roadway purposes, or both, over rivers and streams forming the boundaries of the State of Indiana or a part thereof." (Approved March 2, 1875.)

"SECTION 10. (Sec. 3556, R. S. Ind., 1881.) The said corporation shall have the right to contract, at any agreed sum or rate, with *any railroad company* now existing or which may hereafter be incorporated, *for the annual use of said bridge by the cars or engines, or for the use of said railroad company;* and *any such railroad company* is hereby authorized to subscribe for the stock or purchase the bonds issued by said bridge company, and *is further authorized to make all such guarantees as to the net earnings of said bridge over the cost of operation and repair, as may be agreed upon by the two contracting companies.*"

Here we have power given to any Indiana railroad corporation to *lease* a railroad bridge—and the railroad tracks constructed on it—one end of the bridge being in Indiana and the other end being in an adjoining State. More than that, Indiana railroad corporations

are granted power to *guarantee such net earnings* of such bridges as may be agreed upon.

Why was this law passed? Plainly for the express purpose of encouraging and facilitating the formation by Indiana railroad corporations, of continuous lines of transportation into adjoining States.

Would such a law have been passed if the Indiana railroad corporations, owning lines extending to the boundaries of the State, have no power to make contracts for the possession, use and operation of connecting railroads in adjoining States?

Would the Legislature have given a railroad corporation of Indiana power to guarantee certain net earnings to a link in its continuous line formed by a bridge across a river forming part of the State boundaries, if it is *ultra vires* for that same corporation to guarantee the obligations of a railroad corporation whose line of road connects the guarantor campany's railroad with a bridge spanning the State line?

We now ask the Court to consider several statutes recognizing the existence of the power of Indiana railroad corporations to become lessees or lessors of railroads.

"An Act to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of any railroad company in this State, and to enforce the collection of judgments rendered on account of the same, and to repeal all laws inconsistent therewith. (Approved March 4, 1863.)

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That *lessees*, assignees, receivers,

and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act.

"SEC. 2. (Sec. 4026 R. S. Ind., 1881.) That whenever any animal or animals shall be or shall have been killed or injured by the locomotives, cars or other carriages used on any railroad in, or running into or through this State, whether the same may be or may have been run and controlled by the company, or by the *lessee*, assignee, receiver, or other person, the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company, by the service of a summons by copy on any conductor of any train passing into or through said county, but in all cases when the value of any animal or animals so killed, or the injury done shall exceed $50, the owner or owners of any such animal or animals, may file his or their complaint, and prosecute his or their claim before such justice of the peace, in the Court of Common Pleas, or in the Circuit Court of the county, at his or their option.

SEC. 4. (Sec. 4028 R. S. Ind., 1881.) The action may, in all cases contemplated by this act, be brought against the railroad as defendants, whether the same is or was being run by the company or by a *lessee*, assignee, receiver or other person in the name of such company.

Sec. 5. (Sec. 4029, R. S. Ind., 1881). On the hearing of any such cause, the court or jury trying the same shall give judgment for the plaintiff or plaintiffs for the value of the animal or animals killed or the injury done, without regard to the question whether such killing or injury was the result of wilful misconduct or negligence, or the result of unavoidable accident; and if such cause be commenced in the Common Pleas or Circuit Court of the county in which such animal or animals are killed, or such injury done, the court shall, on motion of the plaintiff or plaintiffs, on the rendition of such judgment, or afterwards at any time, when notice of such motion has been served on the railroad company defendant, at least ten days before the first day of the term of the court at which such motion is to be heard, order a writ to issue, directed to the sheriff of the proper county, for any agent, conductor, employee of such railroad company, or of the *lessees*, receivers or assignee of such company, named in such motion, to appear forthwith or at such time as the court may direct, and answer upon oath as to the amount of money in their hands, if any, belonging to such company, or to such assignees, *lessees*, receivers as aforesaid, and also as to the probable amount of money received by such agents, conductors, or employees as aforesaid, belonging to such railroad company, *lessees*, assignees, or receivers as aforesaid; and if such agent, conductor or employee as aforesaid shall answer that he has, or that they have any such money, or are in the constant receipt of money as such agent, conductor or employee as aforesaid, the Court shall order such agent, conductor or employee as aforesaid, to

pay into the clerk's office of such Court, at such times as may be named by the Court, such portions of the money so held or received as aforesaid, not exceeding one-half the amount thereof, as may be deemed just by the Court, until such judgment and cost is fully paid and satisfied.

Sec. 7. (Sec. 4031, R. S. 1881). This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company, *lessee*, assignee, receiver, or other person running the same."

We submit that no one can read this law without knowing, that by it, the Legislature of Indiana *recognizes* the right of railroads, and railroad property, to be and become lawfully subject to leases and operating contracts, *as an existing right.*

It legislates with regard to the obligations and rights of *lessees of railroads* as being lawfully in the possession, control and operation of leased railroads. To claim that the Legislature, by the repeated use of the words "*lessees*" and "*lessee*" found in every section of this law, intended to legislate with regard to the duties, rights and liabilities of *unlawful possessors* of railroads, and *usurpers of corporate franchises*, would strike the average mind as absurd.

This law was in force when the operating contract in question was made. It all remains in force to-day, excepting the first section.

Many lessee companies were then operating their leased railroads under their own names, and not in the corporate name of the lessor company. When suits were brought against leased lines they answered that

this act did not apply to them, inasmuch as they were not running or controlling the railroad in the corporate name of the lessor company, as defined in the first section of the act. The Supreme Court of Indiana held that lessee companies were right in so pleading, and held that they were not liable, under this act, for stock killed if they were operating their leased railroads in the name of the lessee companies.

To remedy this defect in the law the legislature passed the following amendment to the first section, which is now in force:

"Section 1. (Sec. 4025 R. S. Ind. 1881.) Any railroad, corporation, *lessee*, assignee, receiver, and other person or corporation, running, controlling or operating any railroad into or through this State, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act; And the bills of lading, usually issued at any railroad station in the county in which such stock was killed or injured, shall be *prima facie* evidence as to the character or name in which said railroad was owned, held, controlled or operated." (Approved March 14, 1877).

Again we submit that it is utterly impossible to believe that the Legislature in passing this amendment to the act March 4, 1863, intended to legislate with regard to the obligations and rights of *unlawful possessors and operators of railroads.*

The next act to which we call attention is an act

requiring lessees of railroads to appoint an agent in each county into or through which their *leased railroad* may run. The law is as follows: (Approved March 16, 1877.)

"Section 1. (Sec. 4039 R. S. Ind., 1881.) Every railroad corporation, owning any railroad or the franchises thereof, created under any law of this State, and having no office, director or fixed place of business in this State, and the vendee, *lessee*, or other party owning, running, controlling or operating any railroad into or through this State, shall appoint and keep an agent in each and every county in this State, into or through which such railroad may run, on whom process may be served in any action brought in the proper county against any of the parties herein named, the service on whom shall be held to be a legal service on the defendant, the same as if service had been made on the President or Directors thereof.

Sec. 2. (Sec. 4040 R. S. Ind. 1881.) Each and every party mentioned in the preceeding section shall file a written instrument in the Clerk's office of each and every county in this State, into or through which said railroad may run, under the seal of such corporation, vendee, *lessee* or other party owning, running, controlling, or operating any railroad into or through this State, signed by the President and Secretary, if any, authorizing the service of such process, and consenting that the service thereof, upon such agent, shall be held to be valid in law, and waiving the benefit of error on appeal, by reason of service having been made on such agent."

This law again clearly recognizes the right of lessees to be and remain in the lawful possession and operation of leased railroads.

On April 7, 1881, the following act was passed by the Legislature of Indiana:

"SECTION 1. (Sec. 4018 R. S. Ind., 1881.) *Any railroad company*, now or hereafter lawfully organized, and owning or *operating under lease* or otherwise, *railroads in this State*, be and the same *is hereby authorized and empowered to construct, maintain, own and operate lines of telegraph upon and along the route and right of way of the railroad*, or railroads owned or *operated by it*, and such additional distances beyond the termini of the main line or branches of such road or roads, or from points on the main line or branches thereof as may be necessary to reach business centers, for its own and also for the public or commercial uses, and to connect and operate the same for like use in connection with the telegraph companies or individuals in this or any other State, so as to form a continuous line, upon such terms and conditions for the interchange and forwarding of business as may be mutually agreeable to the parties, and to charge, collect and receive reasonable and customary rates for transmission of telegrams thereupon.

"SEC. 2. (Sec. 4019 R. S. Ind., 1881.) That it shall be lawful for any such company as is named in the first section of this act, and the same is hereby authorized and empowered to acquire, upon terms mutually agreeable to the parties, the right to construct lines of telegraph, or to acquire telegraph lines already constructed upon and along the line of any other railroad or railroads in this or any other State, and to maintain and operate the same separately or in connection with their own line of transmission of its own or public or

commercial telegrams, and charge and collect customary rates therefor; Provided, That all railroad companies owning and operating any telegraph line or lines, under the provisions of this act, shall be subject to all the regulations, penalties and liabilities of telegraph companies as are now, or may hereafter be provided by law, when receiving, transmitting and delivering messages for the public or any individual or company."

By this law valuable franchises are given to *lessee railroad corporations* in respect to their *leased railroads.* By the provisions of the first section any railroad company operating a railroad in this State under *lease* is authorized and empowered to construct, maintain, own and operate lines of telegraph upon and along the right of way of such *leased railroad.* This section further gives such *lessee company* the right to build telegraph lines beyond the termini of the leased lines for the purpose of forming continuous telegraph lines.

By the second section *lessees of Indiana railroads, as such lessees,* are given the right to purchase, maintain, and operate telegraph lines on other railroads, or to build, maintain and operate telegraph lines on other railroads upon such terms as the lessee companies and the other railroad corporations may agree upon.

It is impossible to believe that such a law would have been passed, and such rights and franchises conferred upon lessee railroad corporations, if Indiana railroad corporations possessed no power to become lawful lessors or lessees of railroads.

In a former brief we cited the eighth section of an act passed by the Legislature of Indiana December 18, 1865, That section reads as follows:

(Special Session 1865, p. 121.)

"Sec. 8. In case any railroad or part thereof shall have been, or shall hereafter be *leased*, conveyed or mortgaged to any other railroad company, and shall be in the possession of such other company, under such *lease*, conveyance or mortgage, the road, or part thereof, so *leased*, conveyed or mortgaged, shall, during the continuance of such possession, be assessed, for taxation, as the property of the company having such possession, in the same manner as if it were a part of the road of such *lessee*, grantee or mortgagee, under its own charter; and such *lessee*, grantee or mortgagee, *shall, during the continuance of such possession, have all the rights and be subject to all the duties and liabilities in relation to the road, or parts thereof, so held, which are created by this act*, and both its property and the road, or parts thereof, so held, with its fixtures and the property used in operating the same, shall be liable for the payment of such taxes, in the same manner as railroad property is, in other cases made liable for taxes properly assessed against the same."

In the opinion of Mr. Justice Miller in this case this law is disposed of in these words:

"The mention of lessees as possible holders of the possession of railroad property, neither implies that they are lawfully so, or that such an absolute transfer of road, appurtenances, franchises, powers and their control as the one found in this case, is authorized by law, nor, though it may be in operation, does it give sanction to or create such a law."

We respectfully submit that this law clearly implies something more than the mere purpose of the State to

collect taxes on property in the possession of one who holds it without lawful right.

This law says: "*Such lessee shall, during the continuance of such possession, have all the rights and be subject to all the duties and liabilities in relation to the road so held, which are created by this act.*"

Do not these words clearly imply a *lawful possession?* Would the Legislature confer "rights in relation to the road" upon an unlawful holder of the road—a usurper of franchise rights? Throughout this section *lessees* are put upon the same level as mortgagees and grantees. It is only such companies as are in possession of railroads under *leases, conveyances or mortgages* that are to be treated as the owners, so far as the State is concerned, in the assessment and collection of taxes. It cannot fairly be presumed that the Legislature of Indiana intended to treat as owner of a railroad a lessee corporation unlawfully in possession of the road under an unauthorized and illegal lease.

But this section goes farther and grants to the *lessee corporation*, as such, all rights created by the act. By the fifth section of the act it is provided that any railroad company, dissatisfied with the valuation made by the county appraisers, may appeal from that valuation or assessment to the State Board of Equalization at its first session thereafter, by serving a written or printed notice, sealed with its corporate seal, on the Auditor of State to that effect.

This is one of the rights given by section eight to a lessee corporation. Would the Legislature have conferred upon an illegal possessor of a railroad the right

to contest the amount of taxes assessed against that road, and carry that contest by appeal, in the name of the lessee company, before the State Board of Equalization?

Before proceeding to discuss the authorities upon which the opinion in this case seems to be based, we desire to call the attention of the Court to a few of the many decisions of the Supreme Court of Indiana, recognizing lessees as rightful possessors and operators of leased railroads in Indiana.

SYLLABUS.

"RAILROADS.—*Lease.—Liability for Torts.* A railroad company, running and operating a railroad under a lease from another railroad company, cannot be held liable, either at common law or by virtue of the statute, for torts committed by the lessor prior to the execution of the lease."

DECISION.

"On general principles of law, the defendant cannot, by taking a lease of the road-bed, machinery, franchises and effects of the Chicago, Columbus and Indiana Central Railway Company, become liable for the torts of the latter company committed before the lease. Nor do we think the statute on the subject of killing animals by railroad companies (3 Ind. Stat., 413), fixes upon the lessee any liability for animals killed by the lessor before the execution of the lease.

"The judgment below is reversed, with costs, and the cause remanded for a new trial."

The P., C. & St. L. Ry. Co. v. *Kain*, 35 Ind., pp. 291, 292.

SYLLABUS.

"*Held*, that the averments were not sufficient to charge either company with liability under the statute, as the railroad corporation owning the track was not shown to have authorized the use of its road; nor was the company owning the cars alleged to have been controlling or running the road in the corporate name of the corporation owning the road, either as *lessees*, assignees, receiver, or otherwise."

DECISION.

"The exact question which is now presented has not, so far as we are aware, been decided by this Court. In order to make the Indianapolis, Cincinnati and Lafayette Company liable, jointly or severally, with the company owning the road, the Cincinnati and Martinsville Company, it must have been running or controlling the road of that company, in the corporate name of such company, either as lessee, assignee, receiver, or otherwise. The complaint contains no allegation to this effect, and for this reason, we think, did not show any cause of action against the Indianapolis, Cincinnati and Lafayette Company. If it had been alleged, which may be the fact for aught we know, that the Indianapolis Cincinnati and Lafayette Company was running the Cincinnati and Martinsville Company's road, in its name, under a lease from it, this would have rendered both companies liable, either jointly or severally, for the injury done."

The C. & M. Railroad Co. and another v. *Paskins*, 36 Ind., pp. 380, 382, 383.

SYLLABUS.

"RAILROAD.—*Killing Stock.—Liability of Lessee.—Statute*

Construed.—By the 1st section of the act of March 4th, 1863, (1 R. S. 1876, p. 751,) in relation to animals killed or injured on a railroad, it was intended, that, where a leased railroad is run or controlled by a lessee thereof, 'in the corporate name of the owner,' and not otherwise, such lessee should be liable, jointly or severally with such owner, for stock killed or injured on such railroad, by the cars, etc., thereof, at a place where the same is not, but ought lawfully to be, securely fenced.

"SAME.—A railroad run or operated by a lessee thereof in its 'own name' is not liable, under such statute, for stock so killed or injured.

"SAME.—*Evidence.—Pleading.—Justice of the Peace.*—In an action commenced before a justice of the peace, against a railroad company, to recover for live-stock alleged to have been so killed or injured by the defendant's cars, on the defendant's road, where the same was not, but ought lawfully to have been securely fenced, the defendant may prove, without plea, in bar of the action, that such road was, at the time of such killing or injury, owned by another railroad company, but was being run by the defendant, as lessee, in her own name."

DECISION.

"The plain meaning of this section is, that where a leased railroad is run or controlled by the lessee thereof, in the corporate name of the owner of such railroad, such lessee shall be liable, jointly or severally with such owner, for stock killed or injured, etc."

"In this case, the evidence offered by the appellant, and excluded by the court below, would have tended to prove that the appellant was the lessee of the railroad on which the appellee's stock were killed, and were running and controlling said railroad, at the time said stock were killed, in the appellants own corporate name, and not in the corporate name of the owner of said railroad.

"The statute does not make every lessee of a railroad liable, in any event, for stock killed or injured on the line of the leased railroad which is not securely fenced; but it is the lessee, which runs and controls the leased railroad in the corporate name of the owner of such railroad, which is subjected to such liability."

The P., C. & St. L. Ry. Co. v. *Bolner*, 57 Ind., pp. 572, 573, 575, 576.

SYLLABUS.

"SAME.—*Railroad run by Lessee in its own name.*—Where a railroad is run and operated by a lessee, not in the name of the company, but in its own name, it is not liable, under the statute, for stock killed by it."

DECISION.

"It clearly appeared in evidence, that, at the time and place when and where the appellee's sheep were killed, the appellant was running and controlling the railroad of another railroad company as the lessee thereof, not in the corporate name of said other company, but in the appellant's own corporate name. In such a case, it has been repeatedly held by this Court, that, under the section of the statute above cited, which section was then in force, the lessee of a railroad was not liable for stock killed or injured thereon. *The Pittsburgh, etc. Railway Company* v. *Bolner*, 57 Ind., 572, and the authorities there cited."

The P., C. & St. L. R. W. Co. v. *Hannon*, 60 Ind., pp. 417, 420.

SYLLABUS.

"RAILROAD.—*Killing Stock.—Action against Owner and Lessee.—Pleading.*—In a joint action under the statute against one railroad company as the owner, and another as the lessee, of a certain railroad, to recover for stock alleged to have been killed by the cars of the latter whilst running such railroad, the complaint must, to be sufficient as to the lessee, allege that the lessee was running such railroad in the name of the owner."

DECISION.

"The Court erred in overrulling the demurrer of the Pennsylvania Company to the complaint. It did not contain the material averment, that the lessee, the Pennsylvania Company, was running the Jeffersonville, Madison and Indianapolis Railroad in the name of the latter road.

"There was no evidence tending to show that the lessee was running the leased road in the name of the owner.

"The Court erred in overruling the motion for a new trial on the part of both defendants."

The J., M. & I. R. R. Co. et al. v. *Downey*, 61 Ind., pp. 287, 288, 289.

SYLLABUS.

"SAME.—*Railroad Run in Lessee's Name.*—A railroad company, running the railroad of another company in the name of the former, is not liable, under the statute, for stock killed on such railroad."

DECISION.

"In the case before us, the Cincinnati, Hamilton and Indianapolis Railroad Company, the company on whose road the plaintiff's horse was killed, and which

company would have been liable under the statute, is not sued, but another road which, the amendment to the complaint alleges, was running said road; but the simple fact, that it was running the road on which said horse was killed, did not render that road liable. The statute reads, 'That lessees, assignees, receivers, and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable,' etc.

"The fact that the road is run 'in the corporate name of such company,' is a fact material to the right of recovery."

The C., H. & D. R. R. Co. v. *Bunnell*, 61 Ind., pp. 183, 186.

SYLLABUS.

"RAILROAD.--*Killing Stock.—Liability of Lessee.*—Prior to the amendment of March 14th, 1877, Acts 1877, Spec. Sess., p. 61, the owner of stock killed by a railroad run and operated by a lessee in its own name had no remedy under the statute."

DECISION.

"It appeared by the evidence that the stock was killed in the fall of 1875. It also appeared that at that time the road was owned by the Columbus, Chicago and Indiana Central Railway Company, but was then run and operated by the defendant in its own name.

"It has been held in several cases, that, under the act of 1863, 1 R. S. 1876, p. 751, a recovery cannot be had under such circumstances, against the company killing the stock."

The P., C. & St. L. R. W. Co. v. *Currant*, 61 Ind., pp. 38, 39.

SYLLABUS.

"SAME.—*Liability of Lessee.*—Where a railroad is run and operated by a lessee, not in the name of the company, but in its own name, it is not liable, under section one of the act of March 4th, 1863, 1 R. S. 1876, p. 751, for stock killed by it before such act was amended by the act of March 14, 1877, Acts 1877, Spec. Sess., p. 61.

SAME.—*Evidence.*—*Lease.*—In a suit against such lessee, as owner of such road, for stock killed, the record of the lease from the owner of such road to the lessee thereof, is admissible in evidence under the general denial, to prove such ownership."

DECISION.

"The appellant's alleged ownership of the railroad was one of the questions in issue and for trial. The record of the lease, offered in evidence by the appellant, would have tended to prove that the railroad was owned, not by the appellant, but by the Columbus, Chicago and Indiana Central Railroad Company, and that the appellant was the lessee from the latter company of such railroad. When the appellant offered the record of said lease in evidence, the transcript of this cause shows that the appellee objected to the introduction of said lease in evidence, for the reason that the appellant had not specially pleaded in its answer, that it was controlling said railroad and running its trains thereon, under said lease, as the lessee, and not as the owner of said railroad, and that said lease was not admissible in evidence under the general denial, pleaded by the appellant. The Court sustained the appellee's objections and excluded the offered evidence from the jury, and to this decision the appellant excepted.

"We are of the opinion, that the record of the lease was competent evidence, and admissible under the general denial, without its having been specially pleaded. The appellee's cause of action, if any he had, against the appellant, as stated in each paragraph of his complaint, was purely statutory. If the appellant was the owner of the railroad, as alleged in the complaint, it was clearly liable under the statute, upon the facts stated, to the appellee, for the value of his cows. If, however, the appellant was not the owner, but was merely the lessee of said railroad, and if, as such lessee, the appellant ran and controlled said railroad in its own corporate name, and not in the corporate name of the owner thereof, then it is clear, that, under the statute, the appellant would not be liable to the appellee for running over and killing his cows. The appellee sued the appellant as the owner of the railroad; he alleged that his cows were killed by the appellant's cars, on the appellant's railroad, and this allegation was denied by the appellant's answer. The Court erred, we think, in sustaining the appellee's objection to the admission of the record of the lease in evidence, and in excluding it from the jury."

The P., C. & St. L. Ry, Co. v. *Hunt*, 71 Ind., pp. 230, 235, 236.

SYLLABUS.

RAILROADS.—*Killing Animals.—Complaint.—Name.*—In a complaint against a railroad company for killing animals while operating the road of another company, it is not neeessary under the statute, R. S. 1881, section 4025, to allege in what name the road was being operated.

"The statute contemplates the bringing of the action against the railroad company owning the railroad, as defendant, when, and only when, the road is or was being run by that company, or by a lessee, assignee, receiver or other person, in the name of such company. Section 4028, R. S. 1881.

"When the name in which the defendant is sued is the name in which the road was run or operated at the time of the killing or injury, any person or corporation running, controlling or operating the road is liable."

C. H. & D. R. R. Co. v. *Leviston*, 97 Ind., pp. 488, 495.

Beyond all doubt or cavil these decisions of the Supreme Court of Indiana clearly recognize the right and power of railroad corporations of Indiana to be lessees of other roads, and to be lessors of their own roads.

Would the Supreme Court of Indiana have reversed the decision of the Circuit Court because the Circuit Court refused to admit in evidence the record of the lease under which the appellant was operating the road, if that lease was absolutely void, and if the appellant had no power to be in possession of the road as lessee? Yet the case of *Pittsburgh, Cincinnati and St. Louis Railway Co.* v. *Hunt*, 71 Ind., 235, 236, above cited, was reversed on that ground alone.

The opinion in this case, in so far as it is adverse to the petitioner, the St. Louis, Alton and Terre Haute Railroad Company, seems to be based mainly upon the decision of this Court in *Thomas* v. *Railroad Company*,

101 U. S., 71. It is said in the opinion of Mr. Justice Miller that this case of *Thomas* v. *Railroad Company*, is very much like the case at bar.

We wish to say now once for all, that we agree with the principle decided in the case of *Thomas* v. *Railroad Company*, 101 U. S., 71, and affirmed in *Green Bay and Minnesota Railroad Company* v. *The Union Steamboat Company*, 107 U. S. 98, and cited with approval in *Davis* v. *Old Colony R. R. Co.*, 131 Mass. R. 258. That principle is stated in the case of *Thomas* v. *Railroad Company* in these words:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

We contend that this very principle fairly applied to the statutes of Indiana and to the decisions of the Supreme Court of Indiana, and to the general and well known public policy of Indiana, will give the Indianapolis and St. Louis Railroad Company full power and authority to make this operating contract in controversy. We ask no greater liberality in the construction of Indiana statutes in this case than was given by this Court to the construction of Wisconsin statutes in the case of *Green Bay and Minnesota R. R. Co.* v. *The*

Union Steamboat Co., 107 U. S., 101. In that case, after quoting the Wisconsin laws of 1853 and 1872—which are strikingly similar to the Indiana statutes of 1853 and 1865, above set out—the opinion contains these words:

"These statutes show that the Legislature of Wisconsin recognizing the fact that, from the geographical situation of the State, the railroads which traverse it from east to west form part of a line of transportation across the continent, intended to confer upon the corporations owning such railroads, very large powers of contracting with other corporations owning railroads or steamboats, whose course includes connecting parts of the same great line of transportation."

Suppose we were to put the word "Indiana" in place of the word "Wisconsin" in this quotation, would it not exactly fit this case?

There are many and wide differences between this case at bar and the case of *Thomas* v. *Railroad Company* above cited.

In that case the road was a small road—no part of a trans-continental line of transportation—constructed under a special charter which measured and defined all its powers. The company leased its entire road and property to three individuals, and thereby deprived itself of the power to perform its duties to the public. The suit was brought by these three individual lessees to recover *anticipated profits*, which they claimed would have accrued to them during the unexpired term of the lease if they had been permitted to remain in possession.

This Court held the lease invalid, and that the lessees—the three individuals—could not recover for loss of *anticipated profits.*

How different that is from the case at bar. In this case the Indianapolis and St. Louis Railroad and the St. Louis, Alton and Terre Haute Railroad formed important links in a great through line of transportation across the continent. The Indianapolis and St. Louis Railroad Company is an Indiana corporation controlled by Indiana law. The St. Louis, Alton and Terre Haute Railroad Company is an Illinois corporation controlled by Illinois law.

The Indianapolis and St. Louis Railroad Company is incorporated under, and has the benefit of, the General Railroad Laws of Indiana.

By the operating contract in controversy, the Indianapolis and St. Louis Railroad Company retained full possession and control of all its railroad and corporate property, and added to its usefulness to the public by obtaining control of a continuous line of railway in an adjoining State under the sanction of the laws of that State.

Let us contrast the powers of the New Jersey corporation involved in the case of *Thomas* v. *Railroad Co.* with the powers of the Indianapolis and St. Louis Railroad Company, an Indiana corporation.

INDIANA LAW.	NEW JERSEY CHARTER
POWERS GIVEN TO INDIANA RAILROAD CORPORATIONS.	INVOLVED IN THE CASE OF *Thomas* v. *Railroad Co.*
"To extend said railroad into or through any other State or	"That it shall be lawful for the said company, at any time

States, under such regulations as may be prescribed by the laws of such State or States, into or through which said road may be so extended."

(Sec. 2, Act Feb. 23, 1853).

"Shall have the power to make such contracts and agreements with any such road constructed in an adjoining State * * * for the use of its said road, as to the Board of Directors may seem proper."

(Sec. 3, Act Feb. 23, 1853.)

"May contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States."

(Act of March 3, 1865.)

during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight or passengers, and to enforce the fulfillment of such contracts."

We submit that to attempt to narrow and limit these powers given to Indiana railroad corporations to the narrow limits of power given by the New Jersey charter would be to rob the Indiana statutes of a very large part of their meaning. In fact, it is a matter of surprise that the words of the New Jersey charter should ever have been construed as purporting or intending to grant the power to make any contract by means of which the company would deprive itself of the use of its road and the operation of its franchise rights. We are not surprised that this Court should have said with regard to this clause of the charter: "This is no more than saying, 'you may do the business of carrying goods and passengers, and you may make contracts for doing

that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies."

But how very different this language of the New Jersey charter is from the language of the three statutes last above quoted of Indiana conferring charter powers upon railroad companies.

The only support this provision of the New Jersey charter had outside of the charter itself was found in the act of April 10, 1867, which was that it should be unlawful for the directors, lessees, or agents of said railroad to charge more than three cents per mile for carrying passengers, and six cents per ton per mile for carrying freight, etc.

Can this support be compared with those statutes last above quoted directly conferring the power, and with the various statutes and decisions of the Supreme Court of Indiana hereinbefore cited, clearly recognizing

the existence of the power of an Indiana railroad corporation to become lessee of a connecting line of railroad?

Again it is decided in the case of *Thomas* v. *Railroad Company*, *supra*, that, "where a corporation, like a railroad company, has granted to it by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." We find no fault with the proposition, but simply say it has no possible application to the case at bar. It is admitted by the decision in this case that under the laws of Illinois, the St. Louis, Alton and Terre Haute Railroad Company had full and ample power to execute and deliver this operating contract in controversy. By entering into this operating contract and accepting the possession and control of the St. Louis, Alton and Terre Haute Railroad, the Indianapolis and St. Louis Railroad Company did not in any manner disable itself from performing its duties to the public, but, on the contrary, vastly increased its facilities for accommodating the public. By accepting the possession of a connecting railroad situated in an adjoining State under this operating contract, the Indianapolis and St. Louis Railroad Company did not transfer to others any of its rights or powers,

nor did it relieve itself, or seek to relieve itself, of any of the burdens imposed by its charter, nor did it in any manner violate its contract with the State of its creation, or undertake to do anything contrary to the well-known public policy of the State of Indiana.

In support of the opinion under consideration, this Court has referred to the adjudications in England in regard to the powers of railroad corporations and other like organizations. We do not think that the authority of the English Courts can fairly be called in, to control or measure the rights of railroad corporations in the United States, or as engrafting any limits upon their powers.

In England there is but one unified sovereign power extending throughout its territorial limits. All the corporate rights existing there are derived from that unified sovereignty. The limited territorial extent makes it less essential that railroad corporations should possess power of consolidation, or the power of leasing other railroads. Single lines, under single charters, afford all the facilities that are required by their state and condition, but as we have already suggested, it is not so in the United States. Here continuous lines of railroad crossing ten or fifteen States are required by the demands of commerce. Every railroad corporation must derive its charter powers from some particular State, and the sovereignty thus granting it can confer no rights beyond its territorial limits, while the necessities of trade and business require that transportation and travel from one part of the country to another shall be carried on with as little friction as possible. Hence

long continuous lines of railroad are in our country a necessity. The several parts of these long continuous lines resting in each State, owe their charter rights to the several States upon whose soil they rest. Therefore in determining the character and extent of the powers granted to these integral parts of long continuous lines of railroads, the Courts cannot overlook the general purpose for which these grants of power are made. While we acquiesce in the proposition that a railroad corporation, like other corporate bodies, may exercise only such powers as are granted by what is termed its "charter," and such incidental powers as are implied, we insist that the rules of construction applicable to railroads resting wholly in a single sovereignty cannot by fair implication be made to apply to railroads forming parts of trans-continental lines of transportation. What do the English Courts know about a continuous line of railroad crossing fifteen sovereign States? As was well said by this Court in the case of *Green Bay and Minnesota R. R. Co.* v. *The Union Steamboat Co., 107 U. S., 101*, the geographical condition of a State, and the broad extent of the United States with its commercial necessities as a single country, are to be taken into consideration in construing the power given by State statutes to their respective railroad corporations. We insist that a liberal, rather than a narrow construction of corporate powers ought to be given where the intent and purpose of the corporation, in connection with the business of the country which they are engaged in performing, demands it, and that the Courts, and this Court of all others, is bound to take notice of these demands. Such has been the policy of this Court

heretofore. As far back as 1839, in the case of *Bank of Augusta* v. *Earle*, 13 Pet., 519, this principle was recognized in very strong language, which we here quote:

"The usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the Court cannot overlook them when a question like the one before us is under consideration."

Following this there has been a long line of utterances by this Court in harmony with it, and a retrograde movement at this time would be very embarrassing to the interests of the country.

Once more permit us to press upon the attention of the Court the fact that this operating contract is a contract between railroad corporations of DIFFERENT STATES. It is a contract between an Indiana railroad company and an Illinois railroad company, by means of which the Indiana railroad company obtained an extension of its continuous line of transportation across the State of Illinois under the full sanction of Illinois law. The Indianapolis and St. Louis Railroad Company, by this operating contract, instead of stripping itself of the power to perform the duties to the public enjoined by the grant of its corporate franchises, greatly increased its facilities and ability to serve the public. The precise question to be decided in this case is, can an Indiana railroad company contract for the use and possession of an Illinois railroad for the purpose of extending its line across the State of Illinois? It is conceded that the laws of Illinois permit and sanction such a contract. We

have cited three statutes of Indiana, each of which, we claim, gives an Indiana railroad company full authority to make such a contract for the possession and use of a connecting railroad in an adjoining State. In further support of such power we have cited many statutes of Indiana and many decisions of the Supreme Court of Indiana in which the existence of the power of Indiana railroad companies to become lessees of other roads and lessors of their own roads is clearly recognized. The fact that the making of such contracts, and the operation of railroads under them, is a well known and long established usage in Indiana is beyond dispute. The record in this cause proves that several of the main trunk line railroads into and across Indiana are now, and have been for many years, possessed and operated by lessees under contracts similar to the one here in controversy.

To illustrate the long continued usage and almost universal practice of Indiana railroad corporations to make and accept leases or operating contracts, by which one company possesses and operates the road of another company, and at the same time to show the far reaching and disasterous results of this decision if permitted to stand, we cite a few of the leading lines of road now, and for many years past, held and operated under leases or operating contracts similar to the operating contract in controversy.

The Louisville, New Albany and Chicago Railroad Company operates the Indianapolis and Chicago Air Line Railroad under lease, and by that leased line forms its continuous line from New Albany to Chicago.

An important link of seventy-six miles in the continuous line of the Indianapolis, Peru and Chicago Railroad has always been held and operated under a lease.

The Chicago and Eastern Illinois Railroad Company completes its continuous line from Chicago to Evansville by a lease or operating contract, by which it obtains the use of the Evansville and Crawfordsville Railroad from Terre Haute to Evansville.

All the great "through" or "trunk" lines of the Pennsylvania Railroad Company across Indiana are held and operated under leases of Indiana railroads, either directly to the Pennsylvania Railroad Company or to some company held by the Pennsylvania Railroad Company under lease. It has always reached Indianapolis by lease of the Columbus, Chicago and Indiana Central Railroad. One of its Chicago lines,—known as the "Pan Handle Chicago line,"—crosses Indiana on the Chicago branch of the Columbus, Chicago and Indiana Central Railroad held under lease. Its other and main Chicago line crosses Indiana on the Pittsburgh, Fort Wayne and Chicago Railway, which,—as is shown by the record in this case,—is now, and has been for many years, held and operated under a lease very similar to the contract in controversy. It reaches Vincennes and south-west from Indianapolis by a lease of the Indianapolis and Vincennes Railroad. It reaches the Ohio river at Louisville and Madison from Indianapolis by lease of the Jeffersonville, Madison and Indianapolis Railroad. The Pennsylvania Railroad and its ally, the Terre Haute and Indianapolis Railroad Company, reach St. Louis with their continuous line by

possessing and operating the "Vandialia line" across the State of Illinois under an operating contract between the Terre Haute and Indianapolis Railroad Company and the Vandalia Company almost identical in its provisions with the operating contract in controversy in this case, and made only a year later than the contract in controversy. The greatest difference between these two operating contracts is that the contract under which the Vandalia line is held and operated is for nine hundred and ninety-nine years instead of for ninety-nine years.

The provisions of this last named operating contract under which the Vandalia line is held by an Indiana railroad corporation are considered and discussed in the case of "*Archer et al.* v. *Terre Haute and Indianapolis R. R. Co.*," 102 Illinois Reports, 493. In that decision the Illinois Supreme Court decided that it is an operating contract rather than a lease, but we do not suppose it makes very much difference what the instrument is named, as it is to be judged by its contents rather than by its name.

With what semblance of sincerity can the Pennsylvania Railroad Company or the Pittsburgh, Fort Wayne and Chicago Railway Company come before this Court and deny or question the power of an Indiana railroad corporation to become lessee of another railroad or lessor of its own line?

The record in this case proves that the Pittsburgh, Fort Wayne and Chicago Railway Company—an Indiana railroad corporation—over fifteen years ago leased its entire road and property to the Pennsylvania Railroad Company and to-day stands as lessor to that company, or to some company created and controlled by the

Pennsylvania Railroad Company under lease or contract. The Pennsylvania Railroad Company has either directly or at second-hand, held and operated Indiana railroads under lease for about a quarter of a century, and to-day holds and operates under lease, either directly or indirectly, five of the principal railroads of Indiana.

Just here permit us to say that we do not understand that either the Pennsylvania Railroad Company or the Pittsburgh, Fort Wayne and Chicago Railway Company have ever denied the existence of the power of an Indiana railroad corporation to execute such operating contracts as the one in controversy. Neither of those companies have filed any briefs in this cause in this Court. We do not understand from their answers, filed in the Court below in this case, that they contested at all the validity of the operating contract between the Indianapolis and St. Louis Railroad Company and the St. Louis, Alton and Terre Haute Railroad Company.

The utter lack of sincerity upon the part of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company in its claim in this case that Indiana railroad corporations have no power to become lessees of railroads, is even more strikingly illustrated by its action pending this litigation, and by its present position.

Since this litigation commenced the second mortgage on the Indianapolis and St. Louis Railroad has been foreclosed, and the road sold at foreclosure sale. Immediately after the sale the present Indianapolis and St. Louis Railway Company was organized by the purchasers at foreclosure sale, and on the 23rd day of February, A. D. 1883, the Cleveland, Columbus, Cincinnati

and Indianapolis Railway Company, and the reorganized Indianapolis and St. Louis Railway Company, as *joint lessees* entered into a new lease or operating contract with the St. Louis, Alton and Terre Haute Railroad Company, which is in effect and in fact simply a renewal of the operating contract in controversy in this case, with some slight modifications of some of the provisions of the old contract, but with no change whatever in the *minimum rent to be paid* to the St. Louis Alton and Terre Haute Railroad Company "for the use of its said road." By this renewal of the operating contract under consideration, the lessees agree to complete the relaying of the track of the St. Louis, Alton and Terre Haute Railroad with steel rails, and to keep and maintain it as a first-class western railroad.

In this new contract the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company does not take the place of grantor as in the old contract, but becomes a PRINCIPAL, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Indianapolis and St. Louis Railway Company becoming "joint and several lessees" in the renewed operating contract.

If this Court desires to see this new lease executed by the Indianapolis and St. Louis Railway Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company to the St. Louis, Alton and Terre Haute Railway Company while this cause has been pending in this Court, the contract is set out in full in the printed record in the cause of "*The St. Louis, Alton and Terre Haute Railroad Company* v. *The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company*,

John H. Devereux, Receiver of the Indianapolis and St. Louis Railroad Company and the Pennsylvania Railroad Company," now pending in this Court. It appears on pages 55 to 64 of said printed record, the cause being numbered 806 on the docket of this Court for October Term, 1885. Under this new lease the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Indianapolis and St. Louis Railway Company are now controlling and operating the St. Louis, Alton and Terre Haute Railroad from Terre Haute to East St. Louis.

Would the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company have entered into this new lease if its officers and counsel believed the lease in controversy to be void? Would the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company have bound itself to pay $450,000 per annum for ninety-nine years for the use of the St. Louis, Alton and Terre Haute Railroad if there is no benefit accruing to the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company from the use and control of that road?

We do not refer to this new operating contract as any argument in favor of the validity of the contract in controversy, or as in any manner fixing or determining the liability of the guarantors of the contract under consideration. The Court will observe that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company inserted an article in the lease—Article Sixteen—stipulating that it should not be so used. We do not intend to violate the true spirit of that stipulation, but merely to refer to this new lease as a very striking

illustration of the universal belief in the existence of the power to make such operating contracts. If the officers and counsel of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company had not full belief in the existence of the power to make such a contract they surely would not have made it.

If the operating contract in controversy is void, all these leases and operating contracts above named are void, and the well adjusted and long established railroad system of Indiana is liable at any moment to be torn asunder and thrown into confusion and chaos. Valuable rights have grown up under these various leases and depend upon them all of which rights are in constant jeopardy if these leases are void. But not only does this decision, if it stands, disasterously affect the Indiana railroad system, its effects are far wider. Almost all the trunk lines crossing Illinois are held and operated under such contracts with railroad corporations of Indiana, and States east of Indiana. All these contracts must fall if no power exists in Indiana railroad corporations to make them, for all the lines of railroad crossing Illinois from east to west must of necessity cross Indiana to become through lines to the eastern seaboard. But this decision in effect reaches much farther and has already caused no little disquietude and uneasiness in other States. The only law of New York upon which all the railroad leases in that State depend is no stronger or broader than the laws of Indiana on the same subject. If this lease in controversy is void, we do not see how any railroad lease in New York can be held valid. In fact, the laws of Indiana and New York are so very

similar as to suggest the thought that the Indiana law has been copied from the New York law.

NEW YORK LAW.	INDIANA LAW.
"An act authorizing railroad corporations to contract with each other."	"Any railroad company * * * is hereby empowered to extend said railroad into or through any other State or States under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended."
"Sec. 1. It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the corporation whose railroad is to be used under such contract."	Sec. 2. Act Feb. 23, 1853. "Any railroad company * * * shall have the power to make such contracts and agreements with any such road constructed in an adjoining State * * * for the use of its said road as to the Board of Directors may seem proper."
Laws of 1839, Chap. 218.	Sec. 3. Act Feb. 23, 1853. "Any railroad company * * * may contract for the use and enjoyment, in whole or in part of any railroad or railroads, lying within adjoining States. Sec. 7. Act March 3, 1865.

We have thus, at perhaps too great length, presented the laws and decisions of Indiana in support of the validity of this contract, because we confidently believe the decision as rendered in this case is wrong, and if permitted to stand will not only very greatly injure our client, but will in addition to that injury work widespread disaster. In order to set before the Court the

statutes and decisions bearing upon the question we have made our brief much longer than it would otherwise have been. We feel sure that the magnitude of the interests involved will atone for the length of the brief.

II.

The ground upon which the guaranty contract is, by the opinion in this case, held void, is that the contract guaranteed was itself void, and could not therefore support the guaranty contract. We admit that if the original contract was void the guaranty contract must fall with it, for a guaranty of a void contract must of itself be void.

But we insist that the original contract was valid, and feel confident that this Court will so hold upon a full consideration of the statutes and decisions above cited.

If the original contract is valid, we insist that the guaranty contract is also valid and binding upon the guaranteeing companies. Upon this point the opinion of Mr. Justice Miller contains the following:

"There is no power shown in any of these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and they can not, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. If these guaranteeing companies had executed the original contract of lease it would have been void for want of authority from the Legislature of Indiana, or of any other State by

whose laws they are incorporated or endowed with corporate power. No such power is shown in them to lease roads beyond their own States.

"Indeed, while there may be a just claim of authority for some kind of running arrangement between two connecting roads under the Indiana statutes, there is no connection between the plaintiff's road and any road of a guaranteeing company. The connection even by traffic is remote."

This statement seems to be based on a misunderstanding of the facts.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway is an *Indiana corporation.*

The Pittsburgh, Fort Wayne and Chicago Railway Company is an *Indiana corporation.*

The Pennsylvania Railroad Company is involved in this litigation simply as lessee of the Pittsburgh, Fort Wayne and Chicago Railway, and because by its lease it agreed expressly to perform all the obligations of the Pittsburgh, Fort Wayne and Chicago Railway Company —its lessor—in respect to its guaranty contract.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pittsburgh, Fort Wayne and Chicago Railway Company—both Indiana corporations—are the main guarantors. It is true that the Lake Shore and Michigan Southern Railroad Company is a joint guarantor with the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company in the guaranty contract. At the time this contract was negotiated the Lake Shore and Michigan Southern Railroad Company, or its eastern constituent company, the Lake

Shore Railroad Company, was an Ohio corporation. Since that it has become an Indiana corporation by consolidation with an Indiana Railroad Company.

In the discussion of this question in our original brief, we had not thought it necessary to refer to the laws of Ohio or Pennsylvania as we were treating the contract itself then, and still regard it, as an Indiana contract, so far as the guaranteeing companies were concerned, but we do not think the laws of the States of Ohio and Pennsylvania will justify the inference that the contract was not within the charter authority of those companies which were organized and existing under the laws of those States. It is very certain that the Pennsylvania Railroad Company, which was one of the original promoters of this contract, and has become the assignee of the interests of the Pittsburgh, Fort Wayne and Chicago Railway Company, had such authority expressly conferred upon it by the Legislature of the State of Pennsylvania. We do not understand the Pennsylvania Railroad Company ever to have denied, or as now denying, such authority. Its claim has always been that there was informality and want of regularity in the proceedings attending the execution of the agreement of guaranty.

Mr. Ashley Pond, in his brief in behalf of the Lake Shore and Michigan Southern Railroad Company, filed in this case, on page 15, sets forth the Ohio statute, which we submit is amply broad to support the guaranty of the Lake Shore Railroad Company. But it would be quite immaterial to us even if the Lake Shore Railroad Company should drop out of the contract as gua -

antor, since its joint guarantor, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, is an Indiana corporation and fully responsible.

It is conceded that by the laws of Illinois these guaranteeing companies had full power to make the guaranty contract. Hence if the authority exists in Indiana to make such a guaranty contract, these guaranteeing companies are bound by their contract. The view taken by the Court in the opinion rendered excludes entirely one most important feature of this case, and that is that the guaranteeing companies were the promoters and negotiators of this contract, and negotiated it for the express purpose of procuring the establishment of a continuous line of railroad connecting their roads with St. Louis.

We are surprised to find in the opinion these words:

"There is no connection between the plaintiff's road and any road of a guaranteeing company. The connection even by traffic is remote."

We respectfully submit that the facts proved and set forth in this record will not sustain these statements. It is true that there was no physical connection between the St. Louis, Alton and Terre Haute Railroad and the roads of these guaranteeing companies until the Indianapolis and St. Louis Railroad connected the Cleveland, Columbus, Cincinnati and Indianapolis Railway with the St. Louis, Alton and Terre Haute Railroad by filling the missing link between them, and when that link was supplied all these guaranteeing lines were directly connected with the St. Louis, Alton and Terre Haute Railroad by continuous lines of transportation.

But while it is true that there was at the time of the execution of the contract no physical connection between the plaintiff's road and the roads of the guaranteeing companies, it is equally true and abundantly proved by this record that these guaranteeing companies were the original promoters and negotiators of this contract for the express purpose of procuring the continuous line. The evidence further proves that the contract in controversy was delivered to the guaranteeing companies, and that they actualy possessed and operated the St. Louis, Alton and Terre Haute Railroad, while the Indianapolis and St. Louis Railroad was being built, it being a road on paper only when the contract was made.

More than that, it is proved absolutely that these two guaranteeing companies, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pittsburgh, Ft. Wayne and Chicago Railway Company—both Indiana corporations—for the purpose of building this connecting link, and procuring the continuous line to St. Louis, took substantially all the stock and all the bonds of the Indianapolis and St. Louis Railroad Company, and out of their treasuries furnished the means to build the Indianapolis and St. Louis Railroad, so as to complete the connection. If they had the right and power to create the Indianapolis and St. Louis Railroad Company and to take and pay for its capital stock and its mortgage bonds for the purpose of securing the BENEFITS of a continuous line to St. Louis, they surely had the right to guarantee the contract of their creature, the Indianapolis and St. Louis Railroad Company,

made for that same purpose. All this evidence shows that the traffic was direct instead of remote. In this operating contract several sections are devoted wholly to that subject. In the light of these proved facts, is it a fair statement of the case to say that "there is no connection between plaintiff's road and any road of a guaranteeing company. The connection even by traffic is remote?"

If the decision of this Court in the case of *Van Hostrup* v. *Madison City*, 1 Wall. 291, means anything, it is decisive upon this point, and makes the connection between these guaranteeing companies and the St. Louis, Alton and Terre Haute Railroad Company amply close and fully sufficient to support the guaranty contract. We cited this case and quoted quite freely from it in our original brief in this case on pages 55 to 57.

If no benefit accrued to the guaranteeing companies under this contract, would the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company have made haste to unite with the reorganized Indianapolis and St. Louis Railway Company as joint and several principal in a renewal of this same contract in substance?

In the opinion three authorities are cited against the validity of such contracts of guaranty. The first is an English case decided many years ago with regard to the English system of railroads, confined to and receiving all powers from one sovereignty, and which can scarcely be said to afford an analogy to our railroad system in which the necessities of commerce demand continuous lines of transportation several thousand miles in length, and crossing some fifteen sovereign States.

We have already said that we do not think that on such questions English cases ought to stand as authority superior to the adjudications of our own State Courts, much less should they be held of superior weight to the decissions of this Court.

The next case cited in the opinion is *Plank Road Co.* v. *Watertown Co.* 7 Wis. 59. We do not think that case can be held as superior authority to decisions of the Supreme Court of Indiana, and other State Courts hereinafter cited, which are in direct antagonism with this Wisconsin case.

It seems to us,—this being an Indiana contract, and the main guarantor companies being Indiana corporations,—that the decisions of the Supreme Court of Indiana are entitled to very great weight in the decision of this particular case. The only other case cited in the opinion as tending against the validity of the guaranty contract is *Pearce* v. *Madison and Indianapolis Railway Co.*, 21 How. 441. In our original brief we commented on this case on pages 58 and 84.

Now, as against these three authorities, giving to them all possible weight to which they can be entitled, we ask the Conrt to consider carefully the following authorities, which, we think, clearly support this guaranty contract.

1. What is the settled law on this point in Indiana? In *Smead* v. *The Indianapolis, Pittsburgh and Cleveland R. R. Co.* 11 Ind., 111, 112, the Supreme Court of Indiana clearly decided that Indiana railroad corporations have the right to make such contracts. In that case the Indianapolis and Bellefontaine R. R. Co.,—now the Cleveland

Columbus, Cincinnati and Indianapolis Railway Company,—was pleading *ultra vires*, just as it is here, but the Supreme Court of Indiana held it to its contract, holding that it had full power to make it. This case remains unquestioned authority in Indiana.

Again in the case of *State Board of Agriculture* v. *Citizens Street Ry. Co.* 47 Ind. 407, the Supreme Court of Indiana held the railway Company liable upon a subscription made to secure the location of the State Fair for three years at a point near the northern terminus of said company's railway, the purpose of the railway company in making the subscription being *to increase its business.*

This case is cited with approval by this Court in *Hitchcock* v. *Galveston*, 96 U. S. 351.

Are not these decisions of the Supreme Court of Indiana more than an off-set to the 7th Wisconsin case, especially when the case at bar involves an Indiana contract made by Indiana railroad corporations?

In addition to these decisions of the highest Court of Indiana, we have above cited a statute of Indiana giving Indiana railroad corporations power to guarantee the net earnings of railroad bridges crossing rivers or streams forming part of the boundary line of the State. We think it cannot fairly be disputed that Indiana has given its railroad corporations power to make such contracts of guaranty.

In *Zabriskie* v. *The Cleveland, Columbus and Cincinnati R. R. Co.* 23 How. 381, this Court held the railroad company bound by its guaranty upon the bonds of another railroad company, which contract of guaranty

was made expressly for the purpose of procuring a a continuous connecting line, and establishing business relations for the benefit of the guarantor company. Is not this case as high and strong an authority as the case of *Pearce* v. *Madison and Indianapolis Ry. Co.*, 21 How. 441? It has, so far as we know, never been questioned as authority.

To the same effect are the cases of *Low* v. *Central Pacific R. R. Co.*, 52 Cal., 60, and *Stewart* v. *Erie Transportation Co.*, 11 Minn., 372, 373.

We should perhaps have stated that the case of *Coleman* v. *Eastern Counties Railway*, 10 Bevan, 1, was a case in which an English railway company agreed to guarantee certain profits to, and to secure the capital of, a steam packet company to ply between a port near one end of the railway in England and certain foreign ports. The contract was held invalid under the charter powers of the company.

But against this case we cite the recent decision by this Court in *Green Bay and Minnesota R. R. Co.* v. *Union Steamboat Co.*, 107 U. S., 98, in which just such a contract in substance was held valid under the laws of Wisconsin. The contrast between these two cases is a good illustration of the difference between the English railway system and that of the United States, and well supports our statement that the geographical situation and surrounding conditions should enter into and be considered in any interpretation of corporate powers granted to railroad corporations by the several States of the United States. We have shown that our laws of Indiana are

very like the Wisconsin laws and that our Indiana Supreme Court has gone even beyond the decision in *Green Bay and Minnesota R. R. Co.* v. *Union Steamboat Co.*, *supra*, in giving liberal construction to corporate powers of railway companies in Indiana.

The guaranteeing companies cited *Davis* v. *Old Colony Railroad*, 131 Mass., 258, as an authority against the validity of the guaranty contract.

That was a case in which a Massachusetts railroad corporation undertook to guarantee the expenses of a musical festival in Boston. The only possible ground for so doing was the probable increase of travel by reason of the festival. That contract was held invalid under the Massachusetts law.

The case at bar has no resemblance to this case, but even if it had, we have shown that this contract of guaranty is an Indiana contract by and between Indiana railroad corporations, and that the Supreme Court of Indiana has decided that Indiana railroad corporations have power under Indiana statutes to make contracts quite similar to the contract in the case of *Davis* v. *Old Colony Railroad*, *supra*.

The case of *State Board of Agriculture* v. *Citizens Street Railway Co.*, 47 Ind., 407, heretofore cited, is decisive as to the law of Indiana. More than that, we have cited a statute of Indiana expressly authorizing Indiana railroad corporations to guarantee the net earnings of railway bridges forming links in continuous lines of transportation. These authorities should surely outweigh the Massachusetts case in considering a case involving Indiana railroad corporations and their contracts.

The principle upon which such contracts of guaranty are held valid is clearly and strongly stated by this Court in *Railway Co.* v. *McCarthy*, 96 U. S., 266, and again in *Green Bay and Minnesota R. R. Co.* v. *The Union Steamboat Co.*, 107 U. S., 100. The principle is that railroad corporations, *as incidental to their own proper business*, have the power to make contracts for the transportation of freight and passengers beyond the termini of their corporate lines.

If they have the power to make such contracts, it must of necessity follow that they have the power to incur such pecuniary liability as may be necessary to secure the performance of such contracts.

If this guaranty contract rests for its validity upon the statutes and decisions of Indiana, there can be no question of its validity.

If it rests upon the general principle announced in the two decisions of this Court last above stated, it is certainly valid.

If it rests upon the decisions of the various State Courts, and the general current of judicial decisions, we feel confident that authority in support of such contracts greatly preponderates.

III.

Even if this Court should on reconsideration hold the operating contract and the guaranty contracts *ultra vires*, the equitable right of the St. Louis, Alton and Terre Haute Railroad Company to recover for the use of its road under the contract while it remained in force ought to be maintained.

The only objection urged against the guaranty contract is that there was a defect of power on the part of the guaranteeing companies. There was no defect of power on the part of the St. Louis, Alton and Terre Haute Railroad Company. It is conceded it had full power to accept the guaranty contract and the record shows beyond possible doubt that it surrendered its road and performed the operating contract on its part upon the faith of the guaranty contract. No provision of the charter of either of the contracting companies has been cited or produced prohibiting such contracts; nor is the contract contrary to public policy, as has been very clearly shown, but on the contrary is such in its nature and character as the present needs of the public require to secure the safety of passengers and the safe and speedy transportation and delivery of property by securing single managements upon through lines. In cases of this kind a mere want of power to enter into such contracts cannot be set up by a defaulting party for any other purpose than to terminate the continuance of the contract.

All liabilities incurred under the contract during the time that it is being executed, are in equity preserved and protected.

If there was simply a want of authority upon the part of the guaranteeing companies to make the contract no further right whatever could arise than the right of withdrawing from the continuance of the contract, and in Courts of equity no further right can be regarded. To permit the party that had without authority improvidently entered into such a contract to plead

ultra vires to defeat recovery of what was due under that contract for *past use and occupation* would be for a Court of equity to lend itself to the perpetration of a fraud, which it never does.

We do not contend that if this Court shall finally hold the guaranty contract void, the guaranteeing companies cannot now be permitted to repudiate and abandon it, but we do contend that they cannot evade the payment of liability incurred for the *past performance of the contract.*

They might be permitted to say: "We will no longer perform the contract." But equity estops them from saying: "We will not pay you what we owe you for *past use of your road* under the contract." To permit them to do so would be for a Court of equity to give its sanction to a gross injustice. The opinion in this case contains these words: "There is wanting in the case of the guaranteeing companies one of the strongest reasons usually urged in support of the estoppel as it is sometimes called, namely, that the recalcitrant party has received the money or the property of the other. For, so far from these guaranteeing companies having received of the plaintiff any money or property they are the parties who have been paying money and the plaintiffs receiving it for rent of its road. They are not, therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract, because they have heretofore done so." These statements seem to put this guaranty contract on the footing of a mere accommodation endorsement by the guaranteeing companies *without benefit to themselves from the*

operating contract. But is that the fact in this case? We think not. No one can read the evidence contained in this record and fail to know that these guaranteeing companies procured the execution of the operating contract and entered into the guaranty contract for the express purpose of securing to themselves a great BENEFIT, and that in securing the St. Louis, Alton and Terre Haute Railroad by means of this operating contract and this guaranty contract they did in fact secure to themselves a great BENEFIT.

Without this St. Louis, Alton and Terre Haute Railroad their line westward ended at Indianapolis—or at Terre Haute after they built the Indianapolis and St. Louis Railroad. With lines ending at Indianapolis or Terre Haute, and a parallel hostile line extending on from Terre Haute to St. Louis, their lines would have been mere local roads, and their through business would have been paralized and destroyed. This record shows that the guaranteeing companies realized this fact. They felt it so deeply and regarded the possession and control of a continuous line to St. Louis such a vital necessity that they took from their own treasuries the means necessary to build and equip the Indianapolis and St. Louis Railroad to connect them with this leased line, and by this guaranty contract guaranteed the operating contract of the Indianapolis and St. Louis Railroad Company. With these facts clearly in the record, how can a Court of equity say that these guaranteeing companies received no benfits from the contract while it was being performed?

We are not asking to hold these guaranteeing companies to any *future performance* of the guaranty contract, but are simply asking payment for *past use* of our road under the contract, and while these guaranteeing companies were receiving the full benefit of the contract. We say that in equity they are estopped from denying payment for *past benefits* received under the contract.

If this operating contract conferred no benefit on the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, would that company have bound itself as joint and several principal with the reorganized Indianapolis and St. Louis Railway Company in a new lease of this same St. Louis, Alton and Terre Haute Railroad for ninety-nine years to come, agreeing to pay for the use of the road the same minimum rent provided by the operating contract and guaranty contract in controversy? In our original brief in this case, we cited many decisions of this Court and of various State Courts in support of such estoppel, and in regard to these decisions the opinion contains these words:

"Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the Court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they can not be restored to their original condition, the Court inquires if relief can be given independently of the contract, or whether it will

refuse to interfere as the matter stands. We know of no well considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, it can be compelled to do so."

Here again it seems to be understood that we are seeking to compel *future performance of the contract* by the guaranteeing companies. That is not the case we present to this Court in this record. We are only asking payment for *past performance of the contract*, and for *benefits already received* by the guaranteeing companies.

We do not understand that in the many decisions of this and other Courts on this point the contracts have been *ignored* as to *past performance*, but, on the contrary, that the contracts—even although held *ultra vires* and incapable of future enforcement—have been enforced as to liabilities incurred by reason of past performance. In *Hitchcock* v. *Galveston*, 96 U. S., this Court said:

"The promise to give bonds to the plaintiffs in payment of what they undertook to do, was, therefore, at farthest, only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agriculture* v. *Citizens' Street Railway Co.*, 47 Ind., 407."

This Court has repeatedly held that it will not listen to or consider a plea of *ultra vires* where it will defeat the ends of justice or work a legal wrong.

Railway Co. v. *McCarthy*, 96 U. S. 267.
San Antonio v. *Mehaffey*, 96 U. S. 315.
Daniels v. *Tearney*, 102 U. S. 420.

In many of the cases cited on page 59 of our original brief, the contracts were enforced as to liability already incurred in their performance, while held *ultra vires* and incapable of enforcement in future.

In *National Bank* v. *Matthews*, 98 U. S. 621, *National Bank* v. *Whitney* 103 U. S. 99 and *Fortier* v. *New Orleans Bank* 112 U. S. 440, this Court enforced the contracts, although *ultra vires*, because to have permitted the parties making the agreements to plead *ultra vires* would have defeated the ends of justice and worked a grevious wrong upon the other parties to the agreements who had in good faith performed their part of the contracts.

An application of the principles settled by these decisions to the case at bar would, even if the Court should finally hold the operating contract and the guaranty contract void, compel these guaranteeing companies to pay what is due to the St. Louis, Alton and Terre Haute Railroad Company for *past performance* of the operating contract of which past performance these guaranteeing companies received the benefit.

Respectfully submitted,

JOSEPH E. MCDONALD,
JOHN M. BUTLER.
Solicitors for St. L. A. & T. H. R. R. Co.

Indianapolis, Ind. Sept. 24, 1886.

SUPREME COURT

OF THE

UNITED STATES.

118-630,290

THE PENNSYLVANIA RAILROAD COMPANY AND OTHERS, *Appellants*, *vs.* THE ST. LOUIS, ALTON AND TERRE HAUTE R. R. CO., *Respondents*, AND	No. 112. *October Term Docket.* 1885.
THE ST. LOUIS, ALTON AND TERRE HAUTE R. R. CO., *vs.* THE INDIANAPOLIS AND ST. LOUIS R. R. CO. AND OTHERS, *Respondents.*	No. 209. *October Term Docket.* 1885.

SUPPEMENTAL BRIEF ON BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE R. R. CO., UPON PETITION FOR REHEARING.——ALSO OPINION OF NEW JERSEY COURT OF ERRORS AND APPEALS ANNEXED.

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JOSEPH D. BEDLE,
Counsel for St. L., A. & T. H. R. R. Co.

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SUPPEMENTAL BRIEF ON BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE R. R. CO., UPON PETITION FOR REHEARING.

I.

Since the printing of the brief in support of this petition, it has been discovered that the question of estoppel, upon an *ultra vires* contract has been carefully considered by the Court of Errors and Appeals of the State

of New Jersey. The opinion was delivered in July last, and the same is not yet published. The case is the *Camden and Atlantic R. R, Co.* vs. *The Mays Landing and Egg Harbor City R. R. Co.* The action was for the recovery of rent upon an *ultra vires* lease, between two railroad companies. The opinion of the Court is so full and exhaustive as to make it unnecessary to refer with much particularity to the same. The Court reviews with great care the cases, and declares the principle, that although the contract is *ultra vires*, such a defence will not be permitted to evade performance after receiving the fruits of the bargain. In the language of Van Syckel, J., "The basis upon which the enforcement of the contract in such cases rests is, that the company is estopped from setting up its own unauthorized act, and its own incapacity to evade performance on its part, after receiving the fruits of the bargain. The power of the company is not amplified,—the agreement is none the more legal, in the sense that there was authority to execute it, — the Court simply refuses to entertain the defence, *which common honesty forbids the company to make.*" And in further discussing the question this learned judge also says ; "Apply to it what legal phrase you may, the underlying principle is, that the corporation cannot set up its own infirmity, when it is unconscionable to do so. The law forbids the defence on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained. To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good concience requires it." This is the same Judge who read the opinion of the Court in *Black* vs. *The Delaware and Raritan Canal Co.*, holding that the lease of the United Companies to the Pennsylvania Company was void.

9 C. E. Green, 456.

The question of estoppel in the case before us, does not involve any act prohibited by a statute or against public policy. It is a mere question of excess of authority, and when the one party has received the benefit, it cannot be allowed to retain the fruits and defy all claim to compensation therefor upon the ground of excess of authority. This principle seems to be based upon and required by fair dealing and common honesty.

The New Jersey Court of Appeals runs the distinction clearly, between the right of the State to interpose against a corporation which transcends its power, and the rights which exist between corporate parties.

There is no pretence that the stockholders of these companies complain. The defence is founded upon the mere naked question of excess of corporate authority. Why is it not sound in principle, to prevent a corporation, after having enjoyed the benefit of an excessive contract, from setting up the want of authority against corresponding performance to the extent that the contract has been executed? If the lessee of a railroad, after having obtained possession both of the road and the rolling stock and used the same for years, should, upon repudiation of the lease, decline to deliver up the rolling stock, or, after having sold the same, should decline to pay for it, could the defence of *ultra vires* be set up against a recovery of the rolling stock or its value? Is the fact that the contract may be technically void any ground why the parties should not do what ordinary honesty requires? The tendency in the judicial mind, is to subject corporations to all such obligations as are imposed upon individuals, and not to allow them any greater advantages. Wherein, does the obligation to pay the rent, after the earnings of the road have all been absorbed by the lessee and the other companies interested therein, differ from that, to return rolling stock or pay therefor? It is unconscionable to take and retain the benefit of the road

and its earnings and not make an equivalent performance of the contract, so far as executed.

Courts are exercised at this time upon this great question of the status of the rights of corporations when a contract is technically void.

Special reference is also here made to 93 N. Y. 610, *Woodruff* v. *Erie Railway Co.*

We submit that the only just and practical rule, is to compel a corporation to submit to the ordinary principles of honesty, whenever an *ultra vires* contract is repudiated. Let satisfaction be made according to the agreement so far as executed.

There was a complete execution here of the lease *pro tanto* on one side. The lessee had the possession, control and complete use of the road. Now, granting the right to repudiate or abandon the contract, and there being no question of public policy involved, why is not the simple principle of *paying as far as you have gone*, the natural and just one?

We respectfully insist that the question is far-reaching, and, in view of the fact that for years arrangements for through and connecting lines have grown up and been acted upon, and by the acquiescence of stockholders, not only between states but within states, it can scarcely receive too much discussion and consideration. The condition of the rights of corporations, when *ultra vires* contracts, in whole or in part, have been executed and afterwards avoided, affects the private property of stockholders so closely, and as it may be, so disastrously, or even advantageously, if one party is dishonest, as to justify us in asking a further hearing. The public importance of the question reaches far beyond the rights of the St. Louis, Alton & Terre Haute R. R. Co., however severe the decision of this Honorable Court, if sustained, may be upon that company.

II.

This opinion of Van Syckel, J., also bears strongly upon the liability of the guarantors. They are as much estopped from setting up the defence of *ultra vires* as the nominal lessee (so called). No refinement of argument can disguise the naked fact that the organization and construction of the Indianapolis and St. Louis Road and the operating contract (or lease, if you please,) were but a necessary part of the plan for trunk lines in which the guaranteeing companies were interested, and to accomplish which, stock and bonds of the Indianapolis and St. Louis Road were taken by them. The whole enterprise was really that of the guaranteeing companies, and the road was used for their benefit, and the leased road was but a link therein and operated for their benefit. A re-hearing, we think, would so fully develop the facts in this respect as to make this contention perfectly plain. We are so confirmed upon this point as to fear that there may have been some misapprehension with reference thereto. Mr. Justice Miller says:—"for, so far from these guaranty companies having received of the plaintiffs any money or property, they are the parties who have been paying money, and the plaintiffs receiving it, for rent of its road. They are not therefore estopped on any principles of that doctrine from ceasing to pay money on an illegal contract, because they have heretofore done so." Mr. Justice Bradley says "The contract has been performed on the part of the lessor company and the lessee and its guarantors have enjoyed the benefits of it." He further says, "The whole arrangement in fact was devised by them, for the purpose of facilitating and increasing their business, as integral parts of great trunk

lines, which in the absence of interstate regulations of commerce made by Congress, are of the greatest utility to the business of the country."

The relation of the guaranteeing companies to the lease has been differently regarded by these distinguished Judges, and we respectfully submit that the question in its importance, is deserving of further consideration. The fact of the interest of the guarantors in the lease, in the connecting road and its operation and earnings and the benefit derived therefrom, we think clearly appears in the record.

But even if there is no benefit to the guarantors, a benefit to the lessee, the principal, is sufficient. That is a fundemental doctrine in all cotemporaneous guarantees. The operating contract (or the lease) however, was executed at the instance of the guarantors, and the object was the establishment of trunk lines for their benefit. If the terms of the contract can be enforced against the lessee to the extent that it has been executed, we submit that the guaranteeing contract is binding also to that extent. The doctrine of estoppels in principle, will equally apply to the guarantors as to the lessee. Suppose the leseee should refuse to deliver up rolling stock, as already instanced, or to pay for the same if sold, would not the guarantors be estopped from setting up that there was no liability to indemnity therefor? Would they be permitted to say that there could be no recovery, merely, because the contract was void? In contemplation of law these guaranteeing companies are each just as much a party to the original contract, as the lessee company itself. It was through their instrumentality that the nominal lessee took possession of the road, and it was by virtue of the transaction that the benefits resulting therefrom, enured not only to the lessee, but to the other corporations. It is difficult to conceive of any reason why the guarantors should not be estopped,

equally with the lessee. This question in its present aspect is novel, and the determination of it may be assisted by a further hearing.

III.

The bill is ordered dismissed as to the guaranteeing companies.

The fact that a decree has been obtained against the Indianapolis and St. Louis Company and is unappealed from, makes no difference in the rights of the complainants as to the guarantors. *We claim that the obligation of the guarantors is co-extensive with that of the lessee, whatever it may be*, and that these parties, all, should be compelled at least, to account for all the net revenues of the road, or to pay a fair compensation for the use thereof. They have absorbed the earnings and had the benefit therefrom and they now should make satisfaction therefor.

If there is to be any honesty at all, among corporations which have exceeded their powers by mistake or otherwise, the least that can be done is to account for benefits received. Many subordinate questions may be involved in this, as for instance the Indianapolis and St. Louis Company, instead of buying and supplying rolling stock for the road as agreed, hired and used the property of car trust companies, paying high rates. This might have to be ventilated; and so also the apportionment of earnings to roads forming the through lines. The expense account may also have to be investigated. Bookkeeping is very deceptive, and it may be necessary to overhaul the accounts carefully, still, the least that all these guaranteeing companies can do is to reimburse the complainant below, commensurately with the benefits received by them.

We submit that in no event should the bill be dismissed, but that all equitable rights, whatever they may be, of the complainant, should be protected by this Honorable Court, and, if any amendment is necessary, the right thereto should be recognized, and a dismissal ordered only upon condition that the complainant below does not amend. There is here a manifest wrong to the complainant, which can be righted in this suit.

Upon this branch of the case, also, we think that a further hearing will assist in reaching a just result.

Notwithstanding the limited relief suggested under this head, we cannot see why the true rule is not this—that so far as the contract has been executed, all the defendants below are estopped from setting up *ultra vires* to defeat the payment of the rental, as agreed. The contract is fairly severable in this respect, and this course is just and honest.

October 5, 1886.

Respectfully submitted by

McDONALD & BUTLER,

JOSEPH D. BEDLE,

Counsel for St. L., A. & T. H. R. R. Co.

APPENDIX.

Court of Errors and Appeals of N. J.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY. *vs.* THE MAYS LANDING AND EGG HARBOR CITY RAILROAD.	*In Error.*

SYLLABUS.

1. When a transaction is complete and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation, which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot upon rescission be restored to his former status.

2. The State may interpose its authority at any time and compel an abandonment of the act in excess of power, and if need be revoke the charter of the company for its usurpation.

3. When the State challenges the legality of the transaction the paramount and only question is, whether it has bestowed upon the Company the requisite authority to engage in it.

When the question arises between the Company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed.

4. The liability of the Company does not rest upon the doctrine of ratification, which in ordinary legal acceptation applies to such contracts as a party has authority to make, but upon acquiescence, on which the other party has acted, so that he cannot be restored to his former status, and thereby the Company is precluded from interposing its own infirmity as a defence.

5. Under the circumstances presented by this case, the agreement must be dealt with as a contract executed substantially, on both sides.

COURT OF ERRORS AND APPEALS OF N. J.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY,
Plaintiffs in Error,

vs.

THE MAYS LANDING AND EGG HARBOR CITY RAILROAD COMPANY,
Defendants in Error.

} *In Error.*

ARGUED AT NOVEMBER TERM, 1885.

P. L. VOORHEES, Esq., and Hon. WAYNE MACVEAGH, for pltff. in error.

S. H. GREY, Esq., for defendant in error.

The opinion of the Court was delivered by

VAN SYCKEL, *J.*:—

This was an action of debt brought in the Supreme

Court to recover the rent alleged to be due from Feb'y, 1881, to June 1, 1882, on a lease of its road executed in 1873, by defendant in error to the plaintiff in error, for the term of nine hundred and ninety-nine years. The Mays Landing and Egg Harbor road was built under a charter obtained in 1871, and since its completion in 1872 it has been in the possession of the Camden and Atlantic Company as lessee until February, 1881, at which time the latter Company ceased to operate it, and refused to recognize the validity of the lease.

The defence to the action is rested upon the want of power in the lessee Company to execute the lease.

The Camden and Atlantic Railroad was completed from Camden to Atlantic City in the early part of 1862, under a charter granted in 1852. This road I will hereafter for brevity style the main line, and the Mays Landing and Egg Harbor road the branch road. The Branch road tests its own authority to make a lease and the authority of the main line to accept a lease upon the seventeenth section of the charter of the branch, which provides, that the said branch road is authorized to lease its railroad to (or consolidate with) any other railroad company, which is thereby authorized to take such lease and operate the same for such time or times, and on such terms as the said parties may agree upon.

This language is unquestionably broad enough to confer upon the companies the power requisite to enter into a valid contract for a lease, and no doubt could arise in this case, if the powers of one railroad company can be amplified by provisions in the charter of another.

The title of the act incorporating the Branch Road is: "An Act to incorporate the Mays Landing and Egg Harbor City Railroad Company."

Under that clause of our State Constitution which provides that "to avoid improper influences which may result from intermixing in one and the same act such things

as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title," can the seventeenth section of the Branch Road Charter be upheld so far as it purports to confer additional franchises upon other railroads?

It seems to me very clear that this question must be answered in the negative.

This charter manifestly embraces two distinct objects; it confers power upon the Branch Road to construct its line and to lease it, and attempts to enlarge the authority of all other railroad corporations by permitting them to accept a lease. There is no indication in the title that such legislation was contemplated.

The constitutional restraint could not be revoked for a more salutary purpose than to suppress a scheme to amplify corporate powers in a way which effectually conceals the intention to do so.

Jersey City vs. *Elmendorf*, 18 Vr. 283.

So far as the grant of authority to the main line is concerned the seventeenth section is unconstitutional.

The necessary power to the main line, if it exists, must be sought for in its own charter.

The Camden and Atlantic road had authority under its charter to build the Branch Road from Mays Landing to Egg Harbor City, but as before stated did not exercise that right, the Branch having been constructed under a charter subsequently granted in 1871.

In *Branch* vs. *Jessup*, 106 U. S. 468, Mr. Justice Bradley held that the power granted to a Railroad Company to construct a particular line of railroad carried with it by implication the right to purchase such line of railroad subsequently built by another corporation.

The doctrine I think is sound, and the right to lease for nine hundred and ninety-nine years would co-exist with the right to purchase.

This would establish the power of the main line to enter into the lease, if the right to construct the Branch had survived until the lease was executed.

But by reference to the seventeenth section of the charter of the main line (Laws 1852, p. 271) it will be observed that its power in this respect expired by limitation on the first day of August, 1862.

The section reads as follows :—

"That if the said railroad shall not be completed and "in use at the expiration of ten years from the first day "of August next ensuing, that then and in that case this "act shall be void."

Under the rules which apply to the construction of legislative grants of power, the only interpretation which this language will reasonably bear is, that the authority derived through the charter must be exercised within ten years from August 1, 1852, and that such portion of the road as should not then be constructed could not thereafter be built under the granted authority.

In *Morris and Essex R. R'd* vs. *Central Railroad*, 2 Vr. 205, it was expressly adjudged that the power of a corporation to take the land of an individual is determined by the expiration of the term limited for its exercise, after which the right of eminent domain derived from its charter no longer exists in the Company.

The Branch Road was not constructed until the year 1871, nine years after the expiration of the time limited to the main line for the enjoyment and exercise of its granted powers.

At that time the main line having no longer the right of eminent domain was without the power to build the Branch Road, and consequently in the loss of that authority is involved the deprivation of all power which would flow from it.

It must therefore be conceded that the execution of the lease on the part of the Camden and Atlantic Road was *ultra vires.*

The rule is well settled both in England and in this country that an executory contract, *ultra vires*, cannot be validated by the acquiescence of every stockholder of the Company. It is also generally conceded than an *ultra vires* contract fully executed cannot be receded from.

Field on Corporations, § 263–264.
Green's Brice, 371–2–3.
1 Wood on Railways, §171–2–3.
Thomas vs. *Railroad*, 101 U. S. 71.

The Courts have differed upon the question, whether the plea of *ultra vires* is available by a corporation in an action brought against it for not performing its side of the contract, where the transaction is complete, and nothing remains to be done by the party seeking relief.

Asbury Railway vs. *Riche*, 7 H. of L. 653, is the leading English case.

The Company by its directors entered into an agreement with Riche to give him the construction of a railway from Antwerp to Tournay. After Riche had entered upon the work and executed it in part, the company repudiated the contract as one *ultra vires.*

Riche then brought an action to recover damages for breach of contract.

The case was referred to a barrister to state a special case, and the question of *ultra vires* was that on which the decision was to depend.

The Court was to be at liberty to draw inferences of fact. In the Court of Exchequer two of the three judges were of opinion that the plaintiff should have judgment, and when the case came before the Exchequer Chamber, it was heard before six Judges, who being equally divided in opinion, the judgment was affirmed. On appeal to the House of Lords the judgment was reversed, pronoun-

cing the contract *ultra vires*, and declaring that it was without the power to validate it by their acquiescence. Mr. Justice Folger in 78 N. Y. 187 distinguishes the English case on the ground that the contract with Riche was prohibited by an act of parliament. Although the Court did not rest its decision on that ground, Lord Chelmsford adverted to that fact to distinguish the cases of *Spachman* vs. *Evens* and *Evens* vs. *Smallcomb*, where the act of the Directors was not prohibited by statute, but was merely not warranted by the deed of settlement of the Company. In affirming the judgment now under review it is not necessary to dissent from the conclusion reached in this case. The agreement with Riche was not fully executed on either side and it was one in which payment to him of the money he had expended in behalf of the company under the agreement, would have done complete justice. The suit being for damages for breach of the contract, would have embraced profits which might have resulted from its execution. If the suit had been maintained it would have given the plaintiff a measure of relief greater than was necessary to restore him to the status he occupied before the contract was made.

In *Parish* vs. *Wheeler*, 22 N. Y. 494, Chief Justice Comstock in delivering the opinion of the Court, said that a corporation cannot defend itself against a claim for money paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*, although the plaintiff, when he paid the money knew all the facts. He declared that corporations like individuals, in dealing with other parties must live up to the rules of common honesty.

In the previous case of *Bissell* vs. *The Michigan Southern*, 22 N. Y. 258, the same learned Judge expressed the view, that where a corporation has received the consideration of its unauthorized contract, and restitution will not do complete justice, the other party may sue directly on the contract.

He said that the plea of *ultra vires*, according to its just meaning imports, not that the corporation could not make the unauthorized contract, but that it ought not to have been made. Such a defence therefore rests upon the violation of trust or duty towards the shareholders, and is not entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. This case was decided without an expression of opinion of a majority of the Court on this point, but in the later case of *Kent* vs. *Quicksilver Mining Company*, 78 N. Y. 159, Judge Folger delivered the opinion in which the entire Court concurred, giving the fullest approval to the views of Chief Justice Comstock in the cases cited. The case was one in which the directors had done an act which the Company had no power to do and in which there was no full execution on both sides. It was not of that class of cases, where an authorized act was executed in an unauthorized manner. The transaction was clearly *ultra vires* and in that aspect it was dealt with by the Court. The English and American cases were cited and the cause was ably and elaborately argued.

The propositions mentioned by the Court were, that acts of a corporation, which are not, *per se*, illegal, or *malum prohibitum*, or contrary to public policy, but which are *ultra vires*, affecting only the interests of stockholders may be made good by the assent of shareholders, so that strangers to them dealing in good faith with the corporation will be protected in reliance on those acts.

That it needed not that there be an express assent upon the part of shareholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act and to seek judicial relief after knowledge of it, then acquiesceuce will be presumed.

That where the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent of the stockholders to the use of unauthorized power, will be of no avail.

In *Whitney Armes* vs. *Barlow*, 63 N. Y. 62, the Court of Appeals of New York enforced the *ultra vires* contract against the other party where it had been performed on the part of the corporation. In addition to the estoppel which in that case applied to the person dealing with the company, it is true that none of his rights were infringed by the fact that the transaction was *ultra vires* the Company, and he could not for that reason also interpose that defence. But where shareholders are chargeable with consenting to an understanding, which they have permitted to be executed, they waive their pre-existing rights, which would be affected by the unauthorized act, and become equally subject to the estoppel.

Chief Justice Ruger in *Woodruff* vs. *Erie Railway*, 93 N. Y. 609, in an opinion from which there was no dissent, gave his full approval to the previous cases, and held that under an *ultra vires* lease, the lessee is estopped from questioning its validity in an action to recover the stipulated rent.

In *Bradley* vs. *Ballard*. 55 Ill. 413, Chief Justice Lawrence said that where the contract is executed the doctrine of estoppel is applied for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished. The case was one in which money was borrowed and notes given by a corporation to enable it to prosecute a business, which the lender knew it had no right to undertake.

In *Ferry* vs. *Eagle Lock Company*, 47 Conn. 141, the Eagle Lock Company entered into an unauthorized

agreement with another company to purchase its stock, and run it as a separate company.

The Connecticut Court held that after the contract had been executed and the defendant company had been permitted for five years to transact business under the arrangement, it would not be interfered with.

In *McCutcheon* vs. *Steamboat Company*, 13 Penn. Rep. 13, a foreign corporation had taken a lease of real estate without authority in its charter, and in action for the rent the court enforced the contract.

In *Daist* vs. *Sale*, 83 Ill. 137, the Peoria Marine and Insurance Company executed a deed of trust to secure payment of certain bonds upon which the company had received the money. The bill was filed to enjoin the trustee from selling the premises and to declare the deed of trust void. The Court refused to allow the plea of *ultra vires* to prevail, on the ground that a private corporation cannot be heard in such a defence, where the contract has been performed by the other party, and the corporation has had the benefit of the contract and the performance. The language of Chief Justice Lawrence in *Bradley* vs. *Ballard*, was cited with approbation.

"That it would be pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender knew that the corporation was transacting a business beyond its corporate powers, provided the business itself was free from any intrinsic immorality or illegality."

These views were reaffirmed in *Ward* vs. *Johnson*, 95 Ill. 215, and in *Peoria Road* vs. *Thompson*, 103 Ill. 187.

In *Amerman* vs. *Niles*, 9 C. E. Gr. 13, the Chancellor refused to entertain the defence of *ultra vires* to a mortgage executed by a corporation to secure a debt to the defendants.

Thomas vs. *Railroad Company*, 101 U. S. 71, is relied upon by the plaintiff in error. In that case the lease was held to be *ultra vires* and therefore void.

Mr. Justice Miller for the Court referred to the English cases, and said that although the American cases were conflicting, the preponderance of authority was that an *extra vires* contract, but partly executed, could not be enforced.

He however held the lease there to be contrary to public policy, for the reason that the lessor Company had no power to make the lease, and that thereby it disabled itself to perform the duties which it had undertaken, in accepting its charter from the State, and he therefore treated the contract as one forbidden by the law. He did not question that the lessee would be liable for the rental, for the period during which it had enjoyed the term.

It is to be observed in this case that by the surrender of the lease the lessor was left in his former position, and the rental being paid, no apparent injustice was done.

In the case of *The Mutual Life and Ins. Company* vs. *McKelvay*, 1 Beas. 133, the defendant was successful in his attempt to recede from his contract, but it was not a suit by one of the parties to the unauthorized contract to enforce it against the other. The proceeding was instituted in behalf of corporators, as to whom the learned jurist who decided the case was careful to observe that it did not appear that they insured upon the faith of the *ultra vires* contract, or that they became corporators after the contract was entered into or in consequence of it.

In the conflict of judicial decision on this subject, this Court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is, that when the transaction is complete, and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation, which has acquiesced in it is inadmissible in an action

brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot upon rescission be restored to his former status.

In the cases maintaining the contrary doctrine the reasoning of the Courts has been:

1st. That corporators might, by ratifying corporate acts by their acquiescence, indefinitely extend and amplify their granted powers.

2d. That consent on the part of those who do an act which they have no power to do cannot make it legal.

3d. That to hold that an act performed in executing a void contract makes all its parts valid is to say that the more that is done under an unauthorized contract, the stronger is the claim to its enforcement by the courts.

To the first objection a sufficient answer is that the State may interpose its authority at any time, and compel an abandonment of the act in excess of power, and if need be revoke the charter of the company for its usurpation.

When the State challenges the legality of the transaction, the paramount and only question is, whether it has bestowed upon the Company the requisite authority to engage in it? When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed. It will be admitted that where there is an absence of authority on the part of a corporation to do an act, the requisite power cannot be imported into the transaction, either by the consent of stockholders or by the execution of the contract by the other party to the agreement. The contract must necessarily continue to be *ultra vires.*

No such effect has been attributed in any of the cases to acquiescence or unilateral performance. The basis upon which the enforcement of the contract in such cases rests is, that the company is estopped from setting up its own unauthorized act, and its own incapacity, to evade performance on its part, after receiving the fruits of the bargain. The power of the company is not amplified, the agreement is none the more legal, in the sense that there was authority to execute it, the Court simply refuses to entertain the defence, which common honesty forbids the company to make. A man may become bound by the act of an unauthorized agent, and be held liable to the contract made for him, not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority.

No reason is perceived why the rules of fair dealing, which are so rigorously applied to natural persons, shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf, and for his own advantage, his want of authority to do an act for which he has received the consideration from the other party. Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy are not embraced in this discussion; they cannot furnish a basis for a legal cause of action.

Why is it that *extra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been executed on both sides? Such execution imparts no additional power to the corporate body. It does not transmute the negative into the positive.

The absence of power is as apparent after as before performance. Why is it that corporations are compelled to pay money borrowed in excess of authority, and to pay the stipulated rent for premises unlawfully leased, for the period of occupation?

The law does not imply a contract to pay the bondholders the money thus received. It is illogical to say that the law will imply a contract by the company, which it has no power to make for itself. A contract cannot be implied where an express contract cannot be made. The law recognizes the obligation; it precludes or estops the attempt to evade it. Apply to it what legal phrase you may, the underlying principal is, that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defence on account of the flagrant injustice, which would otherwise be done. The question of corporate power is not entertained.

To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good conscience requires it.

How then can recognition of the estoppel be denied, where the contract has been executed on the one side, and the party performing cannot upon rescission be restored to his former status? Why should the corporate body be permitted to plead its own wrongful act, and set up its own infirmity as a bar to the recovery by the other party of what it should in right and justice be accorded.

It is true that a person cannot by his own act acquire a right against another, the other must in some way bind himself. The acquiescence in the contract in virtue of which the other party performs, and the acceptance of its benefits to constitute the binding acts, and raise the estoppel. I am unable to see how upon a just conception of the legal principles involved, a different rule can be applied, where the corporation has acquiesced in the contract, and the other party by performance on his part has been led into a position from which he cannot be extricated.

Misconception arises from failing to distinguish between those rights which parties acquire as between themselves, and the rule by which corporate authority

must be measured and limited, when the State interposes to assert its prerogative. Nor does the liability of the Company rest upon the doctrine of ratification.

In its ordinary legal acceptation, ratification applies to such contracts as a party has authority to make. Repeated affirmations of acontract by one who has no authority to enter into it, cannot supply the requisite authority.

But acquiescence in it upon which the other party acts, may and does upon settled legal principles preclude the parties from starting the question of power as between themselves. There is in fact a subsisting contract actually executed in due and legal form, which under the rule stated is unimpeachable, except at the instance of the State. It is thus, in legal contemplation impressed with the vigor and incidents of a valid contract as between the parties, and there is no difficulty in enforcing it in a suit at law.

It is like the case of one who makes in legal form a conveyance of real estate which he has no power to convey, and not like the case, where the true owner fails to do some act which may operate as an equitable estoppel to his setting up his title against the person who has been misled by his conduct. In the former case the grantee could maintain an action at law against the grantor to recover possession of the premises granted. In the latter case the relief must be sought in a court of equity.

But whether the rule which I have formulated shall be applied in this case or not, the judgment below should in my opinion be affirmed upon the ground that the lease in this case must be regarded as substantially a contract as fully executed on both sides as those unauthorized contracts, in which money has been loaned to or work done for a corporation, for which it has issued its bond to the creditor.

The agreement was entered into November 3, 1871, between the Camden and Atlantic Railroad Company and the Mays Landing and Egg Harbor City Railroad Company,

in and by which it was agreed, that if the latter Company would construct the Branch Road in a specified manner, on or before the first day of July, 1872, the former Company would guarantee the bonds of the latter Company to the amount of thirty-seven thousand five hundred dollars, to be used in the construction of the said road, and take a lease for the same when completed, for nine hundred and ninety-nine years at a specified rental.

In pursuance of this agreement the bonds were issued by the Branch Road, and guaranteed by the main line. The road was built under the direction of the main line and the lease executed.

Every term of this agreement on both sides has been fulfilled, and the agreement in all respects substantially executed.

The annual report of the directors for the year ending December 31, 1871, recited the terms of this agreement in detail.

Annually thereafter, until 1879, the existence of the lease, and the income and disbursements incident to the operation of the Branch were duly reported to the stockholders of the main line, during all which time no attempt was made to avoid the lease.

We must impute to the stockholders of the main line utter neglect of their affairs, if we say that they did not have notice of the agreement to build the Branch Road and of the lease executed in pursuance thereof. The only reasonable inference from the circumstances proven is that they had no knowledge of the transaction, and that it was engaged in and consummated with their approval and acquiescence. This case presents all the features which have led the judicial mind in the cases cited to establish the distinction between executory and executed contracts, in which respect it essentially differs from the case in 101 U. S. This was not, as in the case in the Federal Court, the mere leasing of a road owned by the lessor, where the repudiation of its terms would

restore both parties to their former status. Here the lessor built the road, not for itself, but at the instance of and for the lessee, with the proceeds of bonds guaranteed by the lessee to promote and effect the scheme. The Branch Road was a mere instrument in the hands of the main line to consummate the undertaking.

By the clearly expressed contract of the parties, the road was to be the road of the lessee, the lessor to have only the fixed rentals.

The lessor has fulfilled every term of its agreement, and put the lessee in possession of all that it stipulated for. Nothing remains on the part of the lessor to be done. We must look at the substance of things in applying legal principles. The lease for nine hundred and ninety-nine years is practically an absolute transfer of the road to the lessee, and the rental a mere mode of paying the lessor for the work done, and money expended, in constructing the road for the lessee, instead of paying a fixed principal sum. The case, does not in effect and substance, differ from what it would have been if the main line had employed the Branch Road to construct the branch at a stipulated price, had issued its bonds in payment, after completion and acceptance of the work.

All the cases concede that under such circumstances the contract must be treated as executed.

If the contract had been to compensate the Branch Road for the work by the bonds of the main line, securing the payment of an annuity for nine hundred and ninety-nine years, and those bonds had been delivered, would it be asserted that it was in substance, the less an executed agreement? It is the merest verbiage and form whether it is termed a lease securing a rental for nine hundred and ninety-nine years, or a bond securing an annuity for a like term.

The injustice and inadmissibility of permitting the main line to repudiate its bonds after it has been in oc-

cupancy of the road for more than seven years, because the road proved to be unprofitable, would not be more glaring, than the inequity of the defence interposed here to the payment of the rental.

The work undertaken to be done was fully executed by the Branch Road, and the manner in which it is to be paid for is immaterial, so far as the principal involved is concerned. There is no consideration of justice and fair dealing, which in the cases referred to led to the rejection of the offer by the corporators to set up their own incapacity in avoidance of their just obligations, which is not forcibly presented by this case. It cannot in the application of legal principles, be dissociated from executed contracts, without disregarding the reasons which lie at the foundation of the rule. If the lease is subject to the defence of *ultra vires*, the guarantee of the bonds is also incapable of enforcement, and thus loss will likewise fall upon those who advanced money upno the faith of the guarantee, to be used under the direction of the lessee and for its purposes.

If such a doctrine is established, who can answer for the solvency of our insurance companies, savings banks, and moneyed institutions? It is a matter of common knowledge that corporate bodies in many instances through misconception of their powers or otherwise, have exceeded the legal limits of their authority.

An action to enforce against the main line its guarantee of these bonds could not be classed with those cases, in which companies have been required to return the money they had received on *ultra vires* contracts, or to pay rentals for the period of occupancy.

If the invalidity of the contract and the right to repudiate it be conceded, the law cannot raise an implied obligation on the ruins of the contract upon which to found a recovery. The liability of the defendant upon the bonds must rest, if it exists at all, upon the contract of the guarantee. The money was not paid to the main

line, but to the obligor of the bonds, and no obligation can be implied on the part of the defendant to repay it. The validity of the guarantee contract must be affirmed, or no action can lie against the defendant.

In the destruction of the contract there must be an entire absence of legal liability.

The legal doctrine, which must be invoked to maintain an action by the bondholders on the guarantee will support the judgment in this case.

The doctrine of estoppel by acquiescence, in cases which presents the characteristics which appear here, can work no inequity, for it may safely be presumed that the parties to be affected by an engagement are competent to determine what will best promote their own interest, and for any error in judgment, they and not others should suffer.

The contrary doctrine, affording so easy an escape from the consequences of their own acts, invites them to overstep the boundaries of their authority.

There can be no dissent from the assertion, that good faith and honest dealing unite in forbidding that the defence here set up shall be successfully interposed. In my opinion the law is against it, and the judgment below should be affirmed.

STATE OF NEW JERSEY,
DEPARTMENT OF STATE.

I, Henry C. Kelsey, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify, that the foregoing is a true copy of an opinion read in the above stated cause, June Term, 1886, as the same is taken from and compared with the original (filed July 19, 1886,) now remaining on file in my office.

In testimony whereof I have hereunto set my hand
[L. S.] and affixed my official seal, at Trenton, this fourth day of October, A. D. 1886.

HENRY C. KELSEY,
Secretary of State.

118-630-290

Supreme Court of the United States.

No. 112.

THE PENNSYLVANIA RAILROAD COMPANY; THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY; THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY; THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY, APPELLANTS,

vs.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY.

No. 209.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, APPELLANT,

vs.

THE INDIANAPOLIS AND ST. LOUIS RAILWAY COMPANY; THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY; THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY; THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR A REHEARING.

J. K. Dawes & John M. Butler Atty

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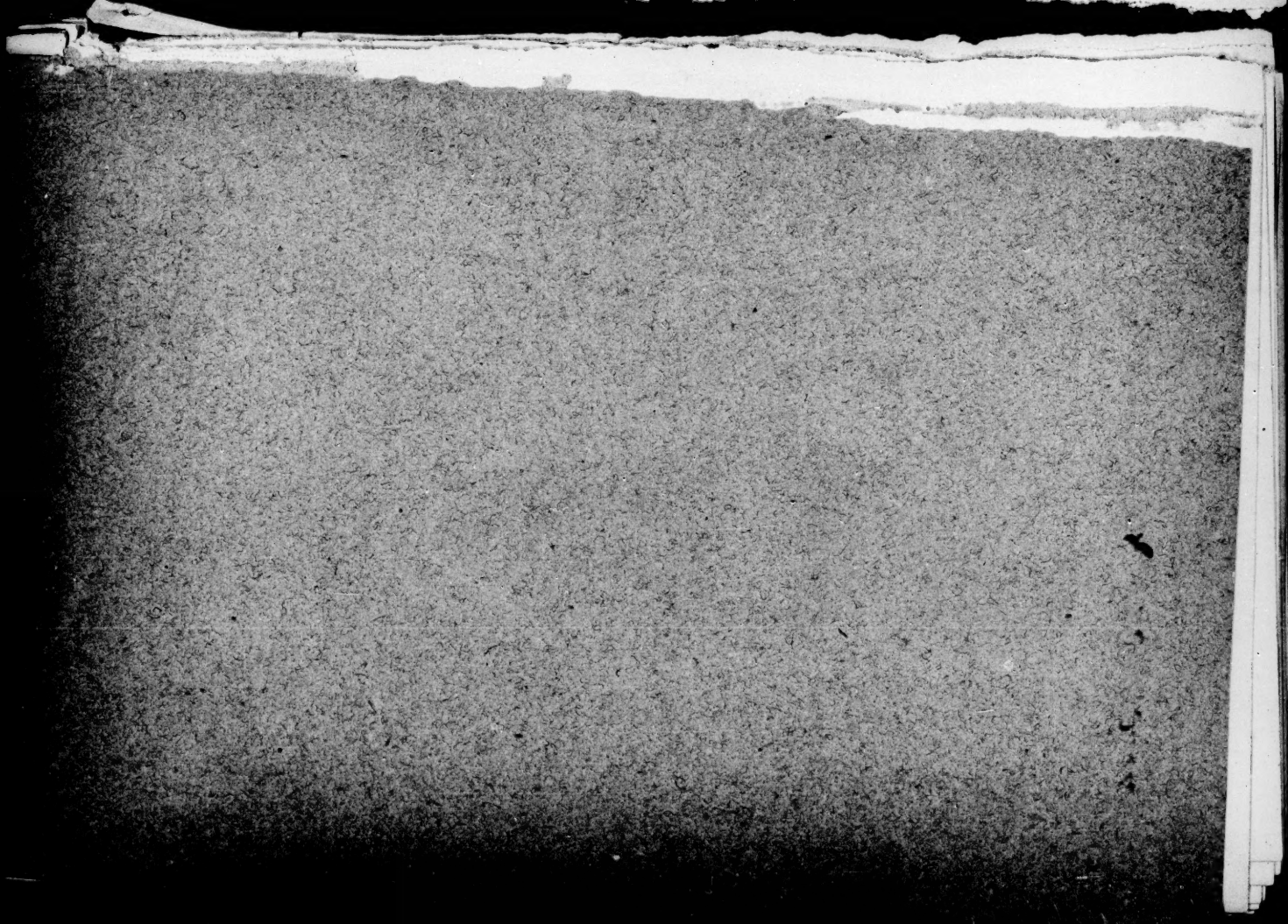

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PETITION FOR A REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The St. Louis, Alton and Terre Haute Railroad Company, a corporation organized and existing under the laws of the State of Illinois and a party to the above suits, respectfully petitions this honorable Court for a rehearing in said causes and each of them upon the following grounds, namely:

FIRST. Your petitioner avers that there is manifest error in the opinion and decree of this Court in the above causes in this: In holding that the contract made by your petitioner with the Indianapolis and St. Louis Railroad Company for the use of its railroad by the last-named company in the manner set out in said contract, as the same appears of record, is void and of no effect for want of authority in said Indianapolis and St. Louis Railroad Company to enter into the same. Your petitioner claims and insists that said Indianapolis and St. Louis Railroad Company, a corporation of the State of Indiana, was expressly authorized by the laws of that State to make such contract or agreement with your petitioner "for the use of its road as to the board of directors of said company might seem proper," and that said contract, so declared void in the opinion rendered in this case, was fairly entered into and fully ratified and approved by the boards of directors of each of said companies. (See Exhibit B, pages 23 to 36.)

In support of this position your petitioner relies upon the provisions of the third section of the act of the Indiana Legislature of February 23, 1853, quoted in the opinion of the Court.

The evident intent and purpose of this section was to authorize railroads organized under the laws of the State of Indiana to form with connecting roads in other States through lines for transportation and travel, and to place such lines under the control for operating purposes of one or either of said roads. The contract under consideration in its terms and its effects accomplishes this purpose, and the manner of effecting that purpose is by the terms of the act left to the discretion of the board of directors. The case of the Board of Commissioners of Tippecanoe county, in 50 Indiana, turned upon the question of the power of the railroad company to lease the finished part of its line and to deprive itself of the means of constructing the remainder of its road and thus segregate the line of road it had been incorporated to complete, and this over the objections of its stockholders, who were interested in the construction of the entire line. The decision of the court was expressly limited to the particular contract and lease under consideration, with a strong implication that leases or contracts for the use of the road for commercial purposes and to secure commercial ends were authorized and recognized by the laws of the State of Indiana. This Court held in the case of the railroad *vs.* Vance, in 96 U. S. R., that the contract under consideration in these cases was valid in the State of Illinois, and the effect of the opinion rendered in these cases is to hold that it is void in the State of Indiana, so that the effect under these decisions is that a contract may be void in one State and valid in another. There may be cases in which this would be good law, but as the contract between your petitioner and the Indianapolis and St. Louis company was to be performed almost wholly in the State of Illinois, it is submitted that being valid in

that State the defaulting party cannot be heard to say that it is void in the State of Indiana. The recognition of the Indianapolis and St. Louis Company by the Illinois Legislature, referred to in the opinion, did not confer any new charter powers upon the Indianapolis and St. Louis Company, but recognized its right to exercise its charter powers in the State of Illinois.

SECOND. It further avers that there is manifest error in the opinion and decree of this Court in this: That it is held by this Court that the guarantor companies are not bound by their several contracts of guaranty, first, by reason of the original contract being, in the opinion of this Court, void, and, secondly, for want of authority on the part of the said companies to enter into such guarantee contracts. The objection to the first point has been sufficiently stated. With regard to the second your petitioner submits that it is erroneous in this, that this honorable Court has wholly failed to take into consideration the fact that the guarantor companies were the promoters of the original contract, and that they organized the Indianapolis and St. Louis Company as their agent and as an instrumentality to secure to them and each of them the use and benefit of said operating contract for the control of the through business passing from St. Louis, eastward, over your petitioner's road; that the contract of guaranty is not separable from the operating contract to which it is attached, but with said operating contract forms one entire contract, in which the guarantor companies were the chief parties in interest. It is not in the nature of a mere guarantee for the debt, default, or miscarriage of a third party, and it is not just and equitable to your petitioner to

treat it as such, as that view leaves entirely out of sight the chief causes which led to its being executed, and entirely ignores the direct interest which the guarantor companies had in it and the consideration which moved directly to the guarantor companies in support of it.

THIRD. It further avers that in said opinion and decree there is manifest error in this: That, holding said contracts of guarantee to be void, this Court also holds that said guarantors are not in any manner bound for the benefits which they and each of them derived from the said contracts during the time the road of your petitioner was being operated under their agent for their use and benefit. The rule, as stated in the opinion of this Court, is not founded on the facts, and is not consistent with the principles of equity as applied to the facts.

The objection to the contracts which this Court holds to be fatal is simply that there was a defect of power on the part of those who contracted with your petitioner, and not in want of power on the part of your petitioner. No provision of the charter of either of the contracting companies has been cited or produced prohibiting such contracts, nor is the contract contrary to public policy, but, on the contrary, is such in its nature and character as the present needs of the public require to secure the safety of passengers and the safe transportation and delivery of property by securing single managements upon through lines. In cases of this kind a mere want of power to enter into such contracts cannot be set up by a defaulting party for any other purpose than to terminate its continuance.

All liabilities incurred under the contract during the time

that it is being executed are in equity preserved and protected.

To this effect is the case of the Board of Agriculture *vs.* Citizens' Street Railway, 47 Indiana, 407; also Railway Company *vs.* McCarthy, 96 U. S., 258, and numerous others cited in petitioner's brief at page 59.

If there was simply a want of authority, as this Court has held, no further right could arise out of that than the right of withdrawal from the continuance of the contract, and in courts of equity no further right would be regarded. To permit the party that had without authority improvidently entered into such a contract to plead *ultra vires* to defeat recovery of what was due under it for past use and occupation would be for a court of equity to lend itself to the perpetration of a fraud, which it never does; where both parties are in the wrong it may refuse its aid to either.

For the cause aforesaid and other good and sufficient causes appearing in said opinion and decree, your petitioner prays this honorable Court to grant a rehearing and to annul and set aside the decree or decrees entered in said causes, and to affirm the judgment and decrees of the circuit court of the United States for the district of Indiana, or to grant such other relief to your petitioner as will consist with equity and good conscience in the premises, and as in duty bound your petitioner will ever pray, &c.

The St. Louis Alton & Terre Haute Rail Road Company By
J. E. McDonald
John M. Butler
Attys.

I, Joseph E. McDonald, one of the counsel for said petitioner, hereby certify that I have examined the petition for a rehearing in the above-entitled causes, and that substantial grounds are shown in said petition for a rehearing.

Jos E McDonald